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Employment Discrimination Laws in Nebraska: A Procedural Labyrinth

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1. This is the first part of a two-part Article.

I. INTRODUCTION

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .[2]

> It shall be an unlawful employment practice for an employer . . . [t]o fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, disability, marital status, or national origin . . . .[3]

> It shall be an unlawful employment practice for an employer . . . [t]o fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against any individual with respect to such individual's compensation, terms, advancement potential, conditions, or privileges of employment because of such individual's race, color, religion, sex, disability, national origin, ancestry, age, marital status, or receipt of public assistance . . . .[4]

An employer in Lincoln, Nebraska, who discharges a person from employment because of her race violates at least[5] three laws.[6] The federal,[7] state,[8] and local[9] governments all prohibit employment discrimination based on race. As the excerpts above indi-

2. Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e-2(a)(1) (1976).
3. NEB. REV. STAT. § 48-1104(1) (1978).
4. LINCOLN, NEB., MUN. CODE § 11.08.040(a) (1980).
5. There are a number of laws prohibiting employment discrimination. *See, e.g.*, Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1976); Age Discrimination in Employment Act of 1967, *as amended*, 29 U.S.C. §§ 621-634 (1976); Vocational Rehabilitation Act of 1973, *as amended*, 29 U.S.C. §§ 701-774 (1976); Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976); Act Prohibiting Unjust Discrimination in Employment Because of Age, NEB. REV. STAT. §§ 48-1001 to 48-1009 (1978 & Supp. 1982); NEB. REV. STAT. §§ 48-1219 to 48-1227 (1978) (the Nebraska Equal Pay Act). The simple example cited in the text may violate laws in addition to the comprehensive employment discrimination laws cited above. *See, e.g.*, Civil Rights Act of 1870, 42 U.S.C. § 1981 (1976). This Article, though, will focus on the procedural interrelationship of the comprehensive laws at the federal, state, and local levels.
6. This assumes, of course, that the other requisites of the respective laws have been met. It assumes, for example, that the employer falls within the definition of "employer" in each law and that a charge of discrimination has been filed in a timely manner.
7. Civil Rights Act of 1964, *as amended*, 42 U.S.C. §§ 2000e to 2000e-17 (1976) [hereinafter referred to as Title VII].
8. Nebraska Fair Employment Practices Act, NEB. REV. STAT. §§ 48-1101 to 48-1126 (1978 & Supp. 1982) [hereinafter referred to as Nebraska FEPA].
9. LINCOLN, NEB., MUN. CODE §§ 11.01.010 to 11.01.070, 11.08.010 to 11.08.180 (1980) [hereinafter referred to as Lincoln FEPO]. Omaha and Grand Island also have local ordinances which prohibit employment discrimination based on race. OMAHA, NEB., MUN. CODE §§ 13-81 to 13-98, 13-116 to 13-222 (1980) [hereinafter referred to as Omaha FEPO]; GRAND ISLAND, NEB., MUN. CODE §§ 37-1 to 37-4, 37-7 to 37-23 (1980) [hereinafter referred to as Grand Island FEPO].

cate,[10] the substantive provisions of these laws are virtually identical.[11] The procedures for enforcing the provisions, however, are quite different. The federal law, Title VII of the Civil Rights Act of 1964,[12] provides for initial review of employment discrimination charges by the Equal Employment Opportunity Commission (EEOC) and for ultimate resolution in a federal district court.[13] The state law, the Fair Employment Practices Act (FEPA),[14] provides for initial investigation by the Nebraska Equal Opportunity Commission (NEOC), a public hearing before an administrative hearing officer, and review by the NEOC and the courts.[15] The local ordinance in Lincoln[16] allows charges to be heard in state

10. *See supra* text accompanying notes 2-4. *See also* OMAHA, NEB., MUN. CODE § 13-89 (1980); GRAND ISLAND, NEB., MUN. CODE § 37-7.1(a) (1980).
11. The following chart facilitates a comparison of the other substantive provisions of Title VII, Nebraska FEPA, Omaha FEPO, Lincoln FEPO, and Grand Island FEPO:

Substantive Provision	Title VII[a]	Nebraska[b]	Omaha[c]	Lincoln[d]	Grand Island[e]
Illegal to limit, segregate, or classify employees on proscribed bases	2000e-2(a)(2)	48-1104(2)	13-89(D)	11.08.040(b)	37-7.1(b)
Illegal employment agency practices	2000e-2(b)	48-1105	13-90	11.08.050	37-7.2
Illegal labor organization practices	2000e-2(c)	48-1106	13-91	11.08.060	37-7.3
Illegal apprenticeship or training programs	2000e-2(d)	48-1107	13-92	11.08.070	*
BFOQ and educational institutions exceptions	2000e-2(e)	48-1108	13-95 to 13-97	11.08.080	37-7.4
Communist Party exception	2000e-2(f)	48-1109	*	*	*
National security exception	2000e-2(g)	48-1110	*	11.08.090	*
Seniority and merit exceptions	2000e-2(h)	48-1111	13-95(C)	11.08.100	13-7.5
Preferential treatment	2000e-2(j)	48-1113	*	11.08.110	37-7.6
Retaliation	2000e-3(a)	48-1114	13-116	11.08.120	*
Notices and publications	2000e-3(b)	48-1115	13-93	11.08.130	*

[a] All citations refer to sections of Title VII.
[b] All citations refer to sections of Nebraska FEPA.
[c] All citations refer to sections of Omaha FEPO.
[d] All citations refer to sections of Lincoln FEPO.
[e] All citations refer to sections of Grand Island FEPO.
* No comparable provision.

12. 42 U.S.C. §§ 2000e to 2000e-17 (1976).
13. Title VII, § 706, 42 U.S.C. § 2000e-5 (1976).
14. NEB. REV. STAT. §§ 48-1101 to 48-1126 (1978 & Supp. 1982).
15. NEB. REV. STAT. §§ 48-1118 to 48-1120 (1978 & Supp. 1982); Rules 2-8, NEOC, 6 NEB. ADMIN. R. 2-1 to 8-1 (1977).
16. LINCOLN, NEB., MUN. CODE §§ 11.01.010 to 11.02.090, 11.08.010 to 11.08.180 (1980).

court[17] or before the Lincoln Human Rights Commission.[18] Thus, the evidentiary hearing on a charge of employment discrimination may be held before any of a number of persons: a federal judge, a state judge, an administrative hearing officer, or a local fair employment practices commission.

Despite this procedural variety, the laws barely touch upon,[19] and certainly do not adequately explain,[20] the interrelationship of the procedures. As a result, a procedural labyrinth worthy of Daedalus has been created which, at times, protects the Minotaur of discrimination.[21] This Article is intended to be a golden thread to aid the passage of Nebraska attorneys into and out of the procedural labyrinth. Although the Article will necessarily refer to the substantive provisions of the employment discrimination laws applicable in Nebraska, the focus will be on procedures.

The Article will appear in two parts.[22] Part One begins by describing the procedural provisions of the state and local fair employment practices laws in Nebraska. It then discusses the interrelationship of those laws. Part Two will first describe the procedural provisions of Title VII and discuss its interrelationship with the state and local laws. The Article will then conclude by

17. LINCOLN, NEB., MUN. CODE § 11.01.030 (1980).
18. LINCOLN, NEB., MUN. CODE §§ 11.02.060 to 11.02.070 (1980).
19. *See* Title VII, § 706, 42 U.S.C. § 2000e-5 (1976); Rule 2-2(d), NEOC, 6 NEB. ADMIN. R. 2-2(d), 2-4 (1977).
20. *See infra* notes 138-55 and accompanying text.
21. And Minos duly paid his vows to Jove,
A hundred bulls, on landing, and in the palace
Hung up the spoils of war, but in his household
Shame had grown big, and the hybrid monster-offspring
Revealed his queen's adultery, and Minos
Contrived to hide this specimen in a maze,
A labyrinth built by Daedalus, an artist
Famous in building, who could set in stone
Confusion and conflict, and decieve the eye
With devious aisles and passages. As Maeander
Plays in the Phrygian fields, a doubtful river,
Flowing and looping back and sends its waters
Either to source or sea, so Daedalus
Made those innumerable windings wander,
And hardly found his own way out again,
Through the deceptive twistings of that prison.
Here Minos shot the Minotaur, and fed him
Twice, each nine years, on tribute claimed from Athens,
Blood of that city's youth. But the third tribute
Ended the rite forever. Ariadne,
For Theseus' sake, supplied the clue, the thread
Of gold, to unwind the maze which no one ever
Had entered and left . . . .
OVID, METAMORPHOSES 186-87 (R. Humphries trans. 1955).
22. Part Two will appear in Volume 62, Number 4 of the *Nebraska Law Review*.

considering procedural strategy in employment discrimination cases in Nebraska.

II. STATE AND LOCAL PROCEDURES

Nebraska did not lead the country into a new era of equal employment opportunity. The Nebraska Legislature failed to pass fair employment practice bills introduced in 1959, 1961, and 1963.[23] In 1964, the Nebraska Supreme Court held Omaha's fair employment practices law unconstitutional because it related to a matter "of statewide and not of local concern."[24] So as matters stood in 1964, local governments could not act in the area and state government would not act. The Nebraska FEPA was finally enacted into law in 1965,[25] partly out of fear that Nebraska would eventually be the only state in the Union without a state fair employment practices law.[26]

Despite this inauspicious beginning, the statewide antidiscrimination effort has grown to include three local ordinances, as well as the state law. Omaha, Lincoln, and Grand Island have ordinances that prohibit employment discrimination.[27] This section will describe and discuss the procedures of the four antidiscrimination laws in Nebraska.

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23. 1963 NEB. LEGIS. J. 197, 2017; 1961 NEB. LEGIS. J. 323, 1522; 1959 NEB. LEGIS. J. 26, 1363.

24. Midwest Employers Council, Inc. v. City of Omaha, 177 Neb. 877, 886, 131 N.W.2d 609, 616 (1964). *See also* City of Omaha Human Relations Dep't v. City Wide Rock Excavation Co., 201 Neb. 405, 408, 268 N.W.2d 98, 101 (1978). The Nebraska Unicameral has since passed legislation authorizing municipalities to enact fair employment practices ordinances and counties to adopt fair employment practices resolutions which are "substantially equivalent to" or "more comprehensive than" the state laws on the subject. NEB. REV. STAT. § 20-113 (Supp. 1982). *See also* NEB. REV. STAT. §§ 18-1724, 20-113.01 (Supp. 1982). Despite this clear statutory language, there still is some doubt about the authority of local governments to enact fair employment practices laws which are more comprehensive than state law, for example, to enact laws which prohibit employment discrimination because of a person's sexual preferences. Opinion letter of Lincoln City Att'y (Nov. 4, 1981) (on file with the *Nebraska Law Review*) (City of Lincoln cannot include sexual preference as a protected class under Lincoln FEPO); Opinion letter from Ass't Att'y Gen., Dale B. Brodkey to State Sen. David Landis (Dec. 14, 1981) (on file with the *Nebraska Law Review*). Although a full discussion of the issue is beyond the scope of this Article, the better view is that local governments do have such authority. *Compare* ch. 120, § 9, 1969 Neb. Laws 544 *with* LB 681, § 1, 1974 Neb. Laws 434.

25. 1965 Neb. Laws 782, 798 (codified at NEB. REV. STAT. §§ 48-1101 to 48-1121 (1978 & Supp. 1982).

26. Floor debate on LB 656, at 1989 (June 14, 1965) (statement of Sen. Mahoney) (copy on file with the *Nebraska Law Review*). *See infra* notes 195-97 and accompanying text.

27. *See supra* note 9.

A. Coverage

All of the Nebraska laws prohibit employment discrimination because of a person's race, color, religion, sex, disability, marital status, or national origin.[28] The local ordinances, in addition, prohibit age discrimination in employment;[29] the state also bans age discrimination in employment, but the restriction is not included in the Nebraska FEPA.[30] The Omaha and Grand Island ordinances also prohibit employment discrimination because of a person's creed;[31] the Lincoln and Grand Island ordinances prohibit employment discrimination because of a person's ancestry;[32] and the Lincoln ordinance prohibits employment discrimination because a person receives public assistance.[33] Every Nebraska law, then, contains broader prohibitions than those in Title VII,[34] but on the other hand the prohibitions are narrower than those contained in some employment discrimination laws.[35]

The prohibitions of all the Nebraska laws apply to employers,[36] labor organizations,[37] and employment agencies.[38] The definitions

28. NEB. REV. STAT. §§ 48-1104 to 48-1106 (1978); OMAHA, NEB., MUN. CODE §§ 13-89 to 13-94 (1980); LINCOLN, NEB., MUN. CODE § 11.08.010 (1980); GRAND ISLAND, NEB., MUN. CODE §§ 37-7.1 to 37-7.3 (1981).

29. See the local ordinances cited, *supra* note 28.

30. *See* NEB. REV. STAT. §§ 48-1001 to 48-1009 (1978 & Supp. 1982). The procedures of the Nebraska age discrimination statute and the federal age discrimination statute, 29 U.S.C. §§ 621-34 (Supp. II 1978), are beyond the scope of this Article.

31. OMAHA, NEB., MUN. CODE §§ 13-89 to 13-94 (1980); GRAND ISLAND, NEB., MUN. CODE §§ 37-7.1 to 37-7.3 (1981).

32. LINCOLN, NEB., MUN. CODE § 11.08.010 (1980); GRAND ISLAND, NEB., MUN. CODE §§ 37-7.1 to 37-7.3 (1981).

33. LINCOLN, NEB., MUN. CODE § 11.08.010 (1980).

34. Title VII prohibits employment discrimination based upon a person's race, color, religion, sex, or national origin. Title VII, § 703, 42 U.S.C. § 2000e-2 (1976). The Supreme Court has recently held that state and local antidiscrimination laws are preempted to the extent they provide broader protection than Title VII and apply to "employee benefit plans" regulated by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1002, 1144(a) (1976). Shaw v. Delta Air Lines, Inc., 103 S. Ct. 2890 (1983).

35. [It is illegal to discriminate in employment] because of [an] individual's sex, race, religion, color, national origin or ancestry, age, handicap, marital status, source of income, arrest record or conviction record, less than honorable discharge, physical appearance, sexual orientation, political beliefs or the fact that such person is a student.

MADISON, WIS., MUN. CODE § 3.23(7)(a) (1979).

36. NEB. REV. STAT. §§ 48-1102(2), 48-1104 (1978 & Supp. 1982); OMAHA, NEB., MUN. CODE §§ 13-88(C), 13-89 (1980); LINCOLN, NEB., MUN. CODE §§ 11.01.010(h), 11.08.040 (1980); GRAND ISLAND, NEB., MUN. CODE §§ 37-3(i), 37-7.1 (1981). *See* 1965-66 Op. Neb. Att'y Gen. 281.

37. NEB. REV. STAT. §§ 48-1102(3), 48-1106 (1978 & Supp. 1982); OMAHA, NEB., MUN. CODE §§ 13-88(E), 13-91 (1980); LINCOLN, NEB., MUN. CODE §§ 11.01.010(1),

of employer, however, differ considerably.[39] The Nebraska FEPA covers employers with fifteen or more employees,[40] the Omaha Fair Employment Practices Ordinance (FEPO) covers employers with six or more employees,[41] the Lincoln FEPO covers employers with four or more employees,[42] and the Grand Island FEPO covers all employers.[43]

B. The Charge

The antidiscrimination procedures all begin with the filing of a charge[44] with a fair employment practices agency[45] or officer.[46] All

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11.08.060 (1980); GRAND ISLAND, NEB., MUN. CODE §§ 37-3(j), 37-7.3 (1981). *See* 1965-66 Op. Neb. Att'y Gen. 281.

38. NEB. REV. STAT. §§ 48-1102(4), 48-1105 (1978 & Supp. 1982); OMAHA, NEB., MUN. CODE §§ 13-88(D), 13-90 (1980); LINCOLN, NEB., MUN. CODE §§ 11.01.010(i), 11.08.050 (1980); GRAND ISLAND, NEB., MUN. CODE §§ 37-3(k), 37-7.2 (1981).
39. This Article will not consider a multitude of coverage issues that might arise. It will not, for example, consider problems in determining (1) what the term "employer" means, *see*, *e.g.*, Baker v. Stuart Broadcasting Co., 560 F.2d 389 (8th Cir. 1977) (related employers may be grouped together to meet requisite number of employees); Pascutoi v. Washburn-McReavy Mortuary, Inc., 10 Empl. Prac. Dec. (CCH) ¶ 10,441 (D. Minn. 1975) (part-time employees should be counted in determining whether employer employs requisite number of employees); Omaha Pub. Schools v. Hall, 211 Neb. 618, 319 N.W.2d 730 (1982) (considers whether political subdivisions are employers under the Nebraska FEPA); (2) what types of employment relationships are covered, *see*, *e.g.*, Hishan v. King & Spalding, 678 F.2d 1022 (11th Cir. 1982) (Title VII does not apply to law firm's decisions regarding partnership); 1979-80 Op. Neb. Att'y Gen. 283 (independent contractors are not protected by the Nebraska FEPA); (3) what the term "employment agency" means, *see*, *e.g.*, Kaplowitz v. Univ. of Chicago, 387 F. Supp. 42 (N.D. Ill. 1974) (placement office of the University of Chicago Law School was an employment agency under Title VII); Brush v. San Francisco Newspaper Printing Co., 315 F. Supp. 577 (N.D. Cal. 1970), *aff'd mem.*, 469 F.2d 89 (9th Cir. 1972), *cert. denied*, 410 U.S. 943 (1973) (newspapers are not employment agencies under Title VII); or (4) the scope of the protected classes, *see*, *e.g.*, Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973) (discrimination based on citizenship is not national origin discrimination under Title VII); Richards v. Omaha Public Schools, 194 Neb. 463, 232 N.W.2d 29 (1975) (pregnancy discrimination is not sex discrimination under the Nebraska FEPA); 1977-78 Op. Neb. Att'y Gen. 55 (discrimination against homosexuals is not sex discrimination under the Nebraska FEPA).
40. NEB. REV. STAT. §§ 48-1102(4), 48-1105 (1978 & Supp. 1982).
41. OMAHA, NEB., MUN. CODE §§ 13-88(D), 13-90 (1980). It should be noted that the Omaha FEPO definition of employer lacks precision and may lead to jurisdictional issues with respect to employers that have a fluctuating number of employees.
42. LINCOLN, NEB., MUN. CODE §§ 11.01.010(i), 11.08.050 (1980).
43. GRAND ISLAND, NEB., MUN. CODE §§ 37-3(K), 37-7.2 (1981).
44. NEB. REV. STAT. § 48-1118(2) (Supp. 1982); Rule 2-1(g), NEOC, 6 NEB. ADMIN. R. 2-2 (1977); OMAHA, NEB., MUN. CODE §§ 13-134 (1980); LINCOLN, NEB., MUN. CODE § 11.02.060 (1980); GRAND ISLAND, NEB., MUN. CODE §§ 37-10(a) (1981). The Lincoln FEPO and Grand Island FEPO refer to the charge as a "complaint". Nevertheless, for purposes of consistency, this Article will refer to

provide that the charge must be filed within 180 days of the alleged discriminatory act[47] and that the charge must be served upon the person against whom the charge is made.[48]

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the initial filing as a charge, regardless of the applicable statute or ordinance. It should be noted that the Lincoln FEPO can also be invoked without the filing of a charge. The city attorney is authorized to commence litigation in district court if (1) any person is engaged in a "continuous pattern or practice" of employment discrimination, or (2) any "group of persons" has been subjected to employment discrimination and the discrimination raises an "issue of general public importance." LINCOLN, NEB., MUN. CODE § 11.01.040(b) (1980).

45. The Nebraska FEPA established the Nebraska Equal Opportunity Commission (NEOC) to receive charges and enforce the Act. NEB. REV. STAT. §§ 48-1116 to 48-1117 (Supp. 1982). The Lincoln FEPO established the Lincoln Commission on Human Rights (the "Lincoln Commission") to enforce the ordinance. LINCOLN, NEB., MUN. CODE §§ 11.02.030 to 11.02.040 (1980). The Grand Island FEPO established the Commission on Human Rights of the City of Grand Island (the "Grand Island Commission") to enforce the Act. GRAND ISLAND, NEB., MUN. CODE §§ 37-1 to 37-2, 37-8 (1981).

46. The Omaha FEPO empowers a Director, OMAHA, NEB., MUN. CODE § 13-122 (1980), and a Civil Rights Hearing Board, *id.* at §§ 13-123 to 13-128 (the "Omaha Commission"), to enforce the ordinance. In essence, the Omaha FEPO separates the prosecutorial and adjudicatory functions with the Director responsible for the former and the Omaha Commission responsible for the latter. Charges are filed with the Director. *Id.* at § 13-134.

47. NEB. REV. STAT. § 48-1118(2) (Supp. 1982); Rule 2-1(g), NEOC, 6 NEB. ADMIN. R. 2-2 (1977); OMAHA, NEB., MUN. CODE § 13-135 (1980); LINCOLN, NEB., MUN. CODE § 11.02.060 (1980); GRAND ISLAND, NEB., MUN. CODE § 37-10(c) (1981).

This Article will not consider a host of timeliness issues that might arise. It will not, for example, consider problems in determining (1) what constitutes the filing of a charge, *see, e.g.*, Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1979) (a complaint sent to the EEOC will qualify as a charge even if it is not then sworn or affirmed); (2) when a violation occurs which commences the running of the limitations period, *see, e.g.*, Delaware State College v. Ricks, 449 U.S. 250 (1980) (limitations period began to run when the charging party was notified of tenure decision even though loss of teaching position did not occur until a year later); Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924 (5th Cir. 1975) (limitations period began to run when potential Title VII violation became apparent to charging party); or (3) what constitutes a continuing violation, *see, e.g.*, United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977) (failure to credit plaintiff for past seniority is not a continuing violation).

48. NEB. REV. STAT. § 48-1118(2) (Supp. 1982); Rule 2-2(a), NEOC, 6 NEB. ADMIN. R. 2-3 (1977); OMAHA, NEB., MUN. CODE § 13-137 (1980); LINCOLN, NEB., MUN. CODE § 11.02.060 (1980); GRAND ISLAND, NEB., MUN. CODE § 37-10(b) (1981). The term "respondent" will be used to refer to the person against whom a charge has been made.

The right of a charging party to file a private lawsuit under the state or local laws should not be prejudiced by the failure of the administrative agency to timely serve notice of the charge on the respondent. *See* Fesel v. Masonic Home, 428 F. Supp. 573, 576 (D. Del. 1977); McAdams v. Thermal Industries, Inc., 428 F. Supp. 156, 159-60 (W.D. Pa. 1977); Heath v. D.H. Baldwin Co., 447 F. Supp. 495, 501-02 (N.D. Miss. 1977).

The procedures differ on who may file a charge. The Lincoln FEPO allows any person claiming to be aggrieved, or his agent or attorney, to file a charge.[49] Similarly, the Omaha FEPO, although ambiguous on the issue, appears to allow anyone to file a charge.[50] The Grand Island FEPO, on the other hand, permits only persons who claim to have been injured to file charges.[51] The Nebraska FEPA appears to require the Lincoln FEPO approach,[52] but the NEOC, by rule, permits only persons who have been personally aggrieved to file charges.[53] The Lincoln and Omaha approach to the issue is preferable. Allowing charges to be filed on behalf of aggrieved persons would "enable aggrieved persons to have charges processed under circumstances where they are unwilling to come forward publicly for fear of economic or physical reprisals."[54]

The NEOC and Grand Island Commission do not have the authority to file charges.[55] They should have initiatory powers. Assume, for example, that in investigating a charge the NEOC discovers that the charging party has not been subjected to discrimination, but that the employer has engaged in widespead discrimination against other employees. In the absence of initiatory powers, the NEOC would be required to dismiss the charge of the charging party and would be powerless to initiate a proceeding addressed to the discrimination discovered during the investigation.[56] In addition, if the enforcement agencies had initiatory powers they would be better able to discover and address systemic or widespread discriminatory practices. Compared to case-by-case adjudication based upon individual charges, this would result in a more efficient utilization of litigation resources and a broader-

49. LINCOLN, NEB., MUN. CODE § 11.02.060 (1980).

50. The Omaha FEPO defines charging party as the "individual making a charge alleging an unlawful practice." OMAHA, NEB., MUN. CODE § 13-82(D) (1980). It does not, then, require the person filing the charge to be "personally aggieved." *Cf.* Rule 2-1(a), NEOC, 6 NEB. ADMIN. R. 2-1 (1977). In addition, the Director is authorized to file charges. OMAHA, NEB., MUN. CODE § 13-82(D) (1980). As a result, the Omaha FEPO avoids problems created by restrictive charge-filing requirements. *See infra* notes 55-59 and accompanying text.

51. GRAND ISLAND, NEB., MUN. CODE § 37-10(a) (1981).

52. NEB. REV. STAT. § 48-1118(1) (1978) (charge may be filed "by *or on behalf of* a person or persons claiming to be aggrieved") (emphasis added).

53. Rule 2-1(a), NEOC, 6 NEB. ADMIN. R. 2-1 (1977). *See also* Rule 1-7, NEOC, 6 NEB. ADMIN. R. 1-2 (1977).

54. 118 CONG. REC. 7,167 (1972) (statement of Sen. Williams). The EEOC has promulgated regulations to govern charges filed on behalf of aggrieved persons. EEOC Procedural Regulations, 29 C.F.R. § 1601.7 (1982).

55. *Cf.* OMAHA, NEB., MUN. CODE § 13-82(D) (1980); LINCOLN NEB., MUN. CODE § 11.02.040(c)(12) (1980); E.E.O.C. COMPL. MAN. (CCH) ¶¶ 221-35 (1979).

56. *See* 1977-78 Op. Neb. Att'y Gen. 415, 416.

based attack on illegal discriminatory practices.[57] For these, and other,[58] reasons, the NEOC and Grand Island Commission should be given the power to file charges.[59]

C. The Reasonable Cause Determination

After receiving a charge, the fair employment practices agency investigates the allegations contained in the charge and determines whether there is reasonable cause to believe that unlawful discrimination has occurred.[60]

If the agency finds no reasonable cause to believe that discrimination has occurred,[61] the agency will dismiss the charge.[62] None of the employment discrimination laws in Nebraska specifically provide for judicial review of an agency decision to dismiss a charge at this stage of the proceedings.[63] Consequently, it could be

57. NEBRASKA ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, NEBRASKA'S OFFICIAL CIVIL RIGHTS AGENCIES 90 (1975) [hereinafter cited as 1975 NEBRASKA ADVISORY COMM.].

58. *See infra* note 81 and accompanying text.

59. The Nebraska Advisory Committee to the United States Commission on Civil Rights has twice recommended that Nebraska enforcement agencies be given initiatory powers. NEBRASKA ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, NEBRASKA HUMAN RIGHTS AGENCIES 20, 54 (1982) [hereinafter cited as 1982 NEBRASKA ADVISORY COMM.]; 1975 NEBRASKA ADVISORY COMM., *supra* note 57, at 90. *See also* M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 31-33 (1966).

60. NEB. REV. STAT. § 48-1118(1) (Supp. 1982); OMAHA, NEB., MUN. CODE § 13-138 (1980) (the Director must make the reasonable cause determination within two years of the filing of the charge, OMAHA, NEB., MUN. CODE § 13-142 (1980)); LINCOLN, NEB., MUN. CODE § 11.02.060 (1980) (the Lincoln FEPO requires the Lincoln Commission investigation to begin within 30 days of the filing of the charge); GRAND ISLAND, NEB., MUN. CODE § 37-8(d) (1981).

61. Rule 2-2(c), NEOC, 6 NEB. ADMIN. R. 2-3 (1977); OMAHA, NEB., MUN. CODE § 13-141 (1980); LINCOLN, NEB., MUN. CODE § 11.02.040(c)(8) (1980); GRAND ISLAND, NEB., MUN. CODE § 37-8(d) (1981).

62. The NEOC will dismiss the charge (1) if it determines that the NEOC lacks jurisdiction; (2) if it determines that there is not reasonable cause to believe that the alleged unfair employment practice has occurred; (3) if the matter is adjusted and settled during the investigation; or (4) if the party filing the charge has failed to cooperate in the investigation of the charge. Rule 2-2(c), NEOC, 6 NEB. ADMIN. R. 2-3 (1977). Although the local agencies are not as specific, presumably they would dismiss a charge for the same or very similar reasons.

63. The judicial review provisions of the Nebraska fair employment practices laws specifically provide for judicial review only at later points in the proceedings. NEB. REV. STAT. § 48-1120 (1978) (judicial review available after a hearing before the NEOC or a hearing officer); OMAHA, NEB., MUN. CODE § 13-199 (1980) (judicial review available after Omaha Commission issues an order); LINCOLN, NEB., MUN. CODE § 11.02.070 (1980) (judicial review available after a hearing before the Lincoln Commission); GRAND ISLAND, NEB., MUN. CODE § 37-14 (1981) (judicial review available after conciliation effort).

The Omaha FEPO does permit a charging party to request a reconsidera-

argued that the agency decision is not subject to judicial review.[64] An agency decision to dismiss a charge, however, should be subject to judicial review. Only through judicial review can a complainant be protected from an erroneous decision made at this early stage of the proceedings.[65]

The legal argument for judicial review of an adverse reasonable cause determination varies depending on the agency making the determination.[66] Adverse reasonable cause determinations by the NEOC can be obtained through an expansive reading of the judi-

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tion of the Director's dismissal of a charge. OMAHA, NEB., MUN. CODE §§ 13-148 to 13-150 (1980). Under the Nebraska FEPA, however, the attorney general has determined that reconsideration is possible only where the NEOC has made a finding of reasonable cause. *Compare*, 1979-80 Op. Neb. Att'y Gen. 260 *with* Opinion letter of Att'y Gen. to NEOC Executive Director, Lawrence R. Myers (Oct. 17, 1977) (on file with the *Nebraska Law Review*). The absence of even the limited review available upon reconsideration underscores the need for judicial review of no reasonable cause determinations. *See infra* note 65 and accompanying text.

64. "The right of appeal [from agency action] in this state is clearly statutory and unless [a] statute provides for an appeal . . . . , such right does not exist." Gretna Pub. School Dist. No. 37 v. State Bd. of Educ., 201 Neb. 769, 772, 272 N.W.2d 268, 269 (1978). *See also* Lydick v. Johns, 185 Neb. 717, 178 N.W.2d 581 (1970); Note, *The Right to Judicial Review of Administrative Agency Action: Nebraska's "Clearly Statutory" Rule*, 58 NEB. L. REV. 1139 (1979).

65. In the absence of review, there would be no judicial interpretation of restrictive jurisdictional decisions and no double-check of "no reasonable cause" determinations. Judicial review of no reasonable cause determinations is particularly important because (1) decisions at this stage of the proceeding are made after an ex parte investigation and without the advantages and checks provided by an adversarial proceeding, *see* Beverly v. Lone Star Lead Constr. Corp., 437 F.2d 1136 (5th Cir. 1971); Flowers v. Local No. 6, Laborers Int'l Union of N. Am., 431 F.2d 205 (7th Cir. 1970); Fekete v. United States Steel Corp., 424 F.2d 331 (3rd Cir. 1970), and (2) "inadequate staffing of state agencies can lead to a tendency to dismiss too many [charges] for alleged lack of [reasonable] cause," Kremer v. Chemical Constr. Corp., 102 S. Ct. 1883, 1910 (1982) (Blackmun, J., dissenting) (citing Bonfield, *An Institutional Analysis of Agencies Administering Fair Employment Practices Laws (Pt. II)*, 42 N.Y.U. L. REV. 1035, 1048-49 (1967)). *See also* Note, *The California FEPC: Stepchild of the State Agencies*, 18 STAN. L. REV. 187, 191 (1965). The federal record is replete with examples of judicial findings in favor of Title VII plaintiffs after an EEOC determination of "no reasonable cause." *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971). *See generally* Note, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 HARV. L. REV. 526, 571-73 (1961).

66. Judicial review may be required by the Constitution. In Logan v. Zimmerman Brush Co., 102 S. Ct. 1148 (1982), the Supreme Court held that a charging party had a property interest in a cause of action created by a state fair employment practices act. The due process clause, then, requires "some form of a hearing" before a charging party can be deprived of his cause of action. *Id.* at 1156-57. The ex parte investigation conducted prior to a reasonable cause determination probably is not sufficient to satisfy the due process clause.

cial review provisions of the Nebraska FEPA[67] or, alternatively, under the Nebraska Administrative Procedure Act.[68] Judicial review of adverse determinations by the Omaha or Grand Island Commissions should be available by filing a petition in error in the appropriate district court.[69] No reasonable cause determinations by the Lincoln Commission should be subject to judicial review under the special appeals statute for cities of the primary class.[70] Regardless of the legal argument utilized, judicial review at this stage of the proceedings would be based on the record of the agency[71] and the remedy for an improper dismissal should be a remand to the agency with directions to find reasonable cause and to continue the proceedings.[72]

67. NEB. REV. STAT. § 48-1120(1) (1978) permits "[a]ny party to a proceeding before the [NEOC] aggrieved by such decision and order [to] institute proceedings in the district court . . . ." The provision clearly applies to an NEOC decision and order based upon a hearing conducted subsequent to a "reasonable cause" determination. The provision could also be interpreted to permit judicial review of an NEOC order to dismiss a charge at an earlier stage of the proceeding. Such an NEOC order must be accompanied by a decision specifying the reasons for the dismissal. Rule 2-2(c), NEOC, 6 NEB. ADMIN. R. 2-3 (1977).

68. If the judicial review provisions of the Nebraska FEPA do not apply to administrative dismissals of charges, the Nebraska Administrative Procedure Act, NEB. REV. STAT. §§ 84-917 to 84-919 (1981), should apply. Duffy v. Physicians Mut. Ins. Co., 191 Neb. 233, 239, 214 N.W.2d 471, 475 (1974). The Nebraska Administrative Procedure Act provides for judicial review of an agency's "final decision in a contested case." NEB. REV. STAT. § 84-917(1) (1981). An NEOC decision to dismiss a charge is clearly a "final decision;" the NEOC takes no further action on a charge once it is dismissed. 1979-80 Op. Neb. Att'y Gen. 260, 262 ("There is no final order of the [NEOC] until they . . . dismiss the action according to their regulations."). It is less clear that the NEOC has acted in a "contested case." The Nebraska Administrative Procedure Act defines a "contested case" as "a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." NEB. REV. STAT. § 84-901(3) (1981). Although a full discussion of the issue is beyond the scope of this Article, a person has a constitutional right to some type of agency hearing, however minimal, before a charge of discrimination can be dismissed. Logan v. Zimmerman Brush Co., 102 S. Ct. 1148 (1982). Thus, judicial review should be available under the Nebraska Administrative Procedure Act. *See generally*, Willborn, *A Time for Change: A Critical Analysis of the Nebraska Administrative Procedure Act*, 60 NEB. L. REV. 1, 12-13, 30-34 (1981).

69. NEB. REV. STAT. §§ 25-1901 to 25-1908 (1979).

70. NEB. REV. STAT. §§ 15-1201 to 15-1205 (1977). *See* American Stores Packing Co. v. Jordan, 213 Neb. 213, 218, 328 N.W.2d 756, 759 (1982).

71. The judicial review provisions of all of the statutes cited above, *see supra* notes 67-70, provide for review based upon the record of the agency.

72. The Nebraska FEPA, Omaha FEPO, and Lincoln FEPO confer the task of initially adjudicating discrimination claims upon the appropriate administrative agency. NEB. REV. STAT. § 48-1119 (1978); OMAHA, NEB., MUN. CODE §§ 13-156 to 13-171 (1980); LINCOLN, NEB., MUN. CODE § 11.02.070 (1980). *Cf.* Title VII, § 706, 42 U.S.C. § 20003-5 (1976) (initial adjudication occurs in federal court).

If the agency finds reasonable cause to believe unlawful discrimination has occurred, either at its own instance or by court order, the agency next attempts to informally settle the matter.

D. Conciliation

After finding reasonable cause, the administrative agency attempts to "eliminate any [unlawful discrimination] by informal methods of conference, conciliation, and persuasion."[73] This effort, commonly called conciliation, is more than simply an attempt by the administrative agency to settle the matter between the charging party and the respondent. To protect the public interest in the elimination of employment discrimination, the agency is also a party to conciliation.[74]

Conciliation may fail, then, even if the charging party and the respondent reach a settlement.[75] For example, the NEOC may refuse to agree to the settlement if the charge contains allegations of class-wide discrimination, but the settlement does not confer any benefits on the class.[76] Theoretically, the NEOC could continue a proceeding even in the face of such a settlement.[77] NEOC continuance of such a suit, however, is only theoretical because the NEOC allows charging parties to withdraw charges at will.[78] Consequently, if the charging party and the respondent reach a settlement, but the NEOC will not agree to it, the charging party simply

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The Grand Island FEPO requires a conciliation effort between the reasonable cause determination and judicial action. GRAND ISLAND, NEB., MUN. CODE § 37-14 (1981). Consequently, a remand to the agency would remedy the error and do the least violence to the respective enforcement schemes.

73. NEB. REV. STAT. § 48-1118(1) (Supp. 1982). *See* Rule 2-3(a), NEOC, 6 NEB. ADMIN. R. 2-5 (1971); OMAHA, NEB., MUN. CODE § 13-142 (1980) (the Director "shall endeavor to eliminate and remedy [the discrimination] by informal methods of conference, conciliation, persuasion and education"); LINCOLN, NEB., MUN. CODE § 11.02.060 (1980); GRAND ISLAND, NEB., MUN. CODE § 37-10(b) (1981).
74. The local agencies do not have regulations dealing with the problems that may arise as part of the conciliation process. As a result, this section will deal with the NEOC's approach to the problems. Presumably, the approach of local agencies would be quite similar. *See* OMAHA, NEB., MUN. CODE § 13-144 (1980) (Director is authorized to enforce conciliation agreements).
75. Rule 2-3(c)(iii), NEOC, 6 NEB. ADMIN. R. 2-6 to 2-7 (1977). *Cf.* 1979-80 Op. Neb. Att'y Gen. 87 (settlement does not deprive NEOC of jurisdiction).
76. *See* E.E.O.C. COMPL. MAN. (CCH) ¶ 345 (1979).
77. In this situation, Rule 2-3(c)(iii), NEOC, 6 NEB. ADMIN. R. 2-6 to 2-7 (1977), provides that the NEOC "*may* close the case as having been settled on terms not approved by the [NEOC]. . . ." (emphasis added). In that situation, however, conciliation has failed; the NEOC must be a party to a conciliation agreement. The Nebraska FEPA says the NEOC "may order a public hearing" when conciliation fails. NEB. REV. STAT. § 48-1119(1) (1978).
78. Rule 2-1(h), NEOC, 6 NEB. ADMIN. R. 2-2 (1977).

withdraws the charge.[79] This process undermines the NEOC's ability to protect the public interest. The problem could be remedied by requiring NEOC consent to any charge withdrawals[80] and/or by permitting the NEOC to file charges on behalf of aggrieved persons.[81]

By the same token, conciliation is more than simply a settlement attempt because the NEOC may dismiss the charge during conciliation even in the absence of an agreement between the charging party and the respondent. The NEOC may dismiss the charge if the respondent has eliminated, or in good faith offered to eliminate, the effects of the alleged illegal employment practice.[82] Dismissal of a charge at this stage of the proceedings once again raises the issue of judicial review.[83] Once again, judicial review should be available.[84]

E. Administrative Hearing

If a charge is not dismissed and conciliation fails, three of the enforcement schemes provide for administrative hearings.[85] The hearing procedures, however, are all slightly different.

Under the Nebraska FEPA, the NEOC orders a public hearing and issues a complaint.[86] After the respondent has had an opportunity to answer,[87] a Hearing Examiner conducts the public hearing.[88] Both the charging party and the respondent are parties and full participants in the hearing.[89] At the conclusion of the hearing,

79. 1979-80 NEOC ANN. REP. 17.
80. *Cf.* EEOC Procedural Regulations, 29 C.F.R. § 1601.10 (1981) ("A charge . . . may be withdrawn . . . only with the consent of the Commission . . . .").
81. *See* E.E.O.C. COMP. MAN. (CCH) ¶ 349 (1979); OMAHA, NEB., MUN. CODE § 13-82(D) (1980) LINCOLN, NEB., MUN. CODE § 11.02.040(c) (12) (1980). *See supra* notes 55-59 and accompanying text.
82. Rule 2-3(c)(ii), 6 NEB. ADMIN. R. 2-6 (1977).
83. *See supra* notes 63-64 and accompanying text.
84. *See supra* notes 65-70 and accompanying text.
85. The Grand Island FEPO does not provide for an administrative hearing. Rather, if conciliation fails, the ordinance provides for a hearing in district court. GRAND ISLAND, NEB., MUN. CODE § 37-14 (1981). *See infra* note 136 and accompanying text.
86. NEB. REV. STAT. § 48-1119(1) (1978). The complaint must be issued within 120 days of the NEOC's reasonable cause determination. Rule 2-3(d), NEOC, 6 NEB. ADMIN. R. 2-7 (1977). The public hearing must be between 20 days and 60 days after issuance and service of the complaint. Rule 2-4(c)(ii), NEOC, 6 NEB. ADMIN. R. 2-9 (1977). The contents of the NEOC complaint and notice of public hearing are specified by rule. Rules 2-4(b) to 2-4(c)(v), NEOC, 6 NEB. ADMIN. R. 2-7 to 2-9 (1977).
87. NEB. REV. STAT. § 48-1119(1) (1978); Rules 2-4(d) to 2-4(d)(vi), NEOC, 6 NEB. ADMIN. R. 2-9 to 2-10 (1977).
88. Rule 3, NEOC, 6 NEB. ADMIN. R. 3-1 to 3-6 (1977).
89. NEB. REV. STAT. § 48-1119(1) (1978).

the Hearing Examiner issues a recommended order and decision.[90] The NEOC then decides the case based upon the record developed before the Hearing Examiner.[91]

Under the Omaha FEPO, the Director commences the hearing process by filing a petition with the Omaha Board.[92] Upon receiving the petition, the Omaha Board notifies the respondent of the date, time, and place of the hearing.[93] After opportunity to answer,[94] a Hearing Examiner conducts the hearing.[95] The Director, usually through an agent, prosecutes the action.[96] The charging party *may* be allowed to intervene as a party.[97] At the conclusion of the hearing, the Hearing Examiner issues a recommended order.[98] The Omaha Board then decides the case based upon the record before the Hearing Examiner and oral argument.[99]

If conciliation is unsuccessful under the Lincoln FEPO, the Lincoln Commission has two options. First, it may refer the charge to the city attorney and request the commencement of an action in district court.[100] If the city attorney concurs,[101] the court action

90. Rule 3-8, NEOC, 6 NEB. ADMIN. R. 3-5 to 3-6 (1977).
91. Rule 4-1, NEOC, 6 NEB. ADMIN. R. 4-6 (1977).
92. OMAHA, NEB., MUN. CODE § 13-145 (1980); OMAHA CIVIL RIGHTS HEARING BD. RULES, ch. 5, rule 1-1 to 1-2 (1981) [hereinafter referred to as OMAHA BD. RULES]. The Omaha FEPO requires the Director to file the petition within 30 days of his determination that conciliation has failed and within two years of the date the charge is filed. OMAHA, NEB., MUN. CODE § 13-146 (1980). The Omaha FEPO does not specify what is to happen if the Director fails to meet these time limits. Presumably, in such an event, a respondent could claim the Director must dismiss the charge. Such a claim, however, should be rejected. The Director's failure to meet a time limit, either at this stage of the proceedings or at any other time, should not prejudice the rights of the charging party. *See* Logan v. Zimmerman Brush Co., 102 S. Ct. 1148 (1982); C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION § 3.2 n.8 (1980) [hereinafter referred to as FEDERAL STATUTORY LAW].
93. OMAHA, NEB., MUN. CODE § 13-156 (1980); OMAHA BD. RULES ch. 5, rules 1-3 to 1-4 (1981).
94. OMAHA, NEB., MUN. CODE § 13-158 (1980); OMAHA BD. RULES ch. 5, rules 2-1 to 2-6 (1981).
95. OMAHA, NEB., MUN. CODE § 13-128(E) (1980); OMAHA BD. RULES ch. 5, rules 4-2 to 4-3 (1981).
96. OMAHA, NEB., MUN. CODE § 13-157 (1980); OMAHA BD. RULES ch. 5, rules 4-4(a), 4-6(a) (1981). The Omaha Board has promulgated a number of rules relating to the hearing. OMAHA BD. RULES ch. 5, rules 4 to 5 (1981).
97. OMAHA, NEB., MUN. CODE § 13-159 (1980); OMAHA BD. RULES ch. 5, rule 4-4(b) (1981).
98. OMAHA BD. RULES ch. 5, rules 7-1 to 7-2 (1981).
99. OMAHA BD. RULES ch. 5, rules 8-1 to 8-3 (1981).
100. LINCOLN, NEB., MUN. CODE § 11.01.030(a) (1980).
101. The city attorney may, under the ordinance, refuse to institute a court action. LINCOLN, NEB., MUN. CODE § 11.01.030(a) (1980). The city attorney's discretion, however, is quite limited. The city attorney may only review the com-

would be brought in the name of the city on behalf of the charging party.[102] Second, the Lincoln Commission may begin the administrative hearing procedure by serving a notice of hearing on the respondent.[103]

The hearing under the Lincoln FEPO is conducted by a Hearing Examiner,[104] but the Lincoln Commission itself attends the hearing[105] and makes the ultimate decision.[106] In contrast to the hearing procedure under the Omaha FEPO,[107] the Lincoln Commission does not prosecute the action.[108] Instead, the charging party and respondent are the only parties to the hearing,[109] although others may be allowed to intervene,[110] and the charging party has the burden of proving his case.[111] The Lincoln Commission has promulgated fairly detailed regulations to govern the hearing.[112]

F. Judicial Review

The judicial review provisions of the four employment discrimination laws in Nebraska are quite different.

Under the Nebraska FEPA, any aggrieved party[113] may appeal

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plaint to determine if it is "legally sufficient," *id.*, and all findings of the Lincoln Commission are binding on the city attorney and the city. LINCOLN, NEB., MUN. CODE § 11.01.030(b) (1980).

102. LINCOLN, NEB., MUN. CODE § 11.01.030(a) (1980).

103. LINCOLN, NEB., MUN. CODE § 11.02.070(a) (1980); LINCOLN, NEB., COMM'N ON HUMAN RIGHTS, RULES AND REGS. FOR CONDUCTING PUB. HEARINGS, rules 1-1 to 1-2 (1982) [hereinafter referred to as LINCOLN RULES].

104. LINCOLN, NEB., MUN. CODE § 11.02.070(b) (1980); LINCOLN RULES, rule 4-2(a) (1982).

105. LINCOLN, NEB., MUN. CODE § 11.02.070(b) (1980); LINCOLN RULES, rule 4-2(b) (1982).

106. LINCOLN, NEB., MUN. CODE § 11.02.070(e)-(f) (1980); LINCOLN RULES, rule 10-1 (1982).

107. *See supra* notes 96-97 and accompanying text.

108. LINCOLN, NEB., MUN. CODE §§ 11.02.060(b), 11.02.070(d) (1980); LINCOLN RULES, rules 4-4(a), 4-6(a) (1982). The Lincoln Commission has the power to file charges. LINCOLN, NEB., MUN. CODE § 11.02.040(c)(12) (1980). At hearings based upon a charge filed by the Lincoln Commission, the case is prosecuted by an attorney on the staff of the city attorney. LINCOLN, NEB., MUN. CODE § 11.02.070(c) (1980).

109. LINCOLN RULES, rule 4-4(a) (1982).

110. LINCOLN RULES, rule 4-4(b) (1982).

111. LINCOLN, NEB., MUN. CODE § 11.02.060(b) (1980); LINCOLN RULES, rules 4-6(a), 16-1 (1982).

112. LINCOLN RULES, rules 1 to 16 (1982).

113. NEB. REV. STAT. § 48-1120(1) (1978). The Nebraska FEPA does not define the term "party." It is clear, however, that the charging party and the respondent are parties. NEB. REV. STAT. § 48-1119(1) (1978). In addition, "any other person whose testimony has a bearing on the matter may be allowed to intervene." NEB. REV. STAT. § 48-1119(1) (1978). Thus, the scope of the term "party" is quite broad. To appeal, a party must be aggrieved. There is no guidance under the statute as to what constitutes aggrievement, even though,

the NEOC's decision to district court.[114] To obtain substantive review, an aggrieved party must institute an action in district court within thirty days from service of the NEOC's decision and order.[115] If a timely action is not filed, the NEOC may obtain enforcement of its decision and order upon a minimal showing of jurisdiction.[116]

The district court's review is based upon the record developed before the Hearing Examiner.[117] Under the Nebraska FEPA, then, there is only one adjudicatory hearing. The hearing occurs before a Hearing Examiner. All subsequent review is based upon the record developed at that hearing.

The district court may overturn the NEOC's order and decision if it is contrary to law,[118] unreasonable or arbitrary,[119] or unsupported by a preponderance of the evidence.[120] This scope of re-

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as will be shown, the right of appeal to court is quite significant. *See infra* notes 247-51 and accompanying text.

114. NEB. REV. STAT. § 48-1120(1) (1978). Judicial review need not take place in the same county in which the public hearing was held. The public hearing must be held in the county where the alleged unfair practice occurred. NEB. REV. STAT. § 48-1119(1) (1978). Judicial review may take place in that county or in any county in which a respondent required to take affirmative action by an NEOC decision and order, resides or transacts business. NEB. REV. STAT. § 48-1120(1) (1978). Thus, a respondent with businesses throughout the state who loses before the NEOC may file for review in virtually any county in the state and, hence, require the NEOC and the charging party to defend in that county. On the other hand, a charging party who loses before the NEOC may file only in the county where the alleged unfair practice occurred. This discrepancy may result in forum shopping and inconvenience to the parties; it should be eliminated.

115. NEB. REV. STAT. § 48-1120(1) (1978).

116. NEB. REV. STAT. § 48-1120(7) (1978). This provision, in essence, places the burden of proceeding on aggrieved parties. If they do not seek timely judicial review, they will lose their opportunity for substantive review. *Cf.* FTC v. Morton Salt Co., 334 U.S. 37 (1948).

117. NEB. REV. STAT. § 48-1120(3) (1978).

118. NEB. REV. STAT. § 48-1120(3)(a) (1978).

119. NEB. REV. STAT. § 48-1120(3)(b) (1978).

120. *Id.* The Nebraska FEPA provides a different standard of judicial review for NEOC decisions than the Nebraska Administrative Procedure Act provides for judicial review of the contested case determinations of other agencies. *Compare* NEB. REV. STAT. § 48-1120(3) (1978) *with* NEB. REV. STAT. § 84-917(6) (1981). *See* Duffy v. Physicians Mut. Ins. Co., 191 Neb. 233, 239, 214 N.W.2d 471, 475 (1974). *See generally* Note, *Employment Discrimination—Nebraska Supreme Court Finds a Need to Prove Intent in Instances of Individual Discrimination*, Duffy v. Physicians Mutual Ins. Co., 191 Neb. 233, 214 N.W.2d 471 (1974), 8 CREIGHTON L. REV. 6, 14-17 (1974). The Nebraska FEPA uses a "preponderance of the evidence" standard for reviewing factual matters rather than a "substantial evidence" standard. *Compare* NEB. REV. STAT. § 48-1120(3)(b) (1978) *with* NEB. REV. STAT. § 84-917(6)(e) (1981). Use of this standard gives district courts greater latitude in reviewing NEOC decisions. *See, e.g.*, Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003, 1006 (5th Cir. 1978)

view authorizes, in effect, a trial de novo upon the record in the district court.[121] The statute provides for appellate review.[122] The statute also provides for an award of attorneys' fees to the prevailing party in the district court.[123]

The Omaha FEPO provides that any aggrieved party[124] may ap-

(substantial evidence is something less than a preponderance of the evidence).

121. Snygg v. City of Scottsbluff Police Dep't., 201 Neb. 16, 17-18, 266 N.W.2d 76, 77 (1978). The Nebraska Supreme Court has exhibited some confusion on this point. In Farmer v. Richman Gordman Stores, Inc., 203 Neb. 222, 278 N.W.2d 332 (1979), the court correctly cited *Snygg* for the proposition that "the review in the District Court amounts to a trial de novo upon the record." *Id.* at 223, 278 N.W.2d at 332-33. However, the court went on to say that the "District Court was under the obligation to try the case de novo to determine whether there was substantial evidence on which to base the order." *Id.* at 226, 278 N.W.2d at 334. That simply does not make sense. De novo review is different from review based upon a substantial evidence standard. *Compare* Wright v. Employment Div., 24 Or. App. 323, 326, 545 P.2d 613, 614 (1976) *with* Cusson v. Firemen's & Policemen's Civil Serv. Comm'n, 524 S.W.2d 88, 90 (Tex. Civ. App. 1975). If the district courts are to engage in de novo review, they should not merely be deciding whether substantial evidence supports the order. The latter-cited statement in *Farmer* should be viewed as a temporary moment of confusion, an ill-advised use of loose language.

122. NEB. REV. STAT. § 48-1120(4) (1978). The Nebraska Supreme Court will uphold factual findings by a district court if they are supported by substantial evidence, but will review legal findings for their correctness. Ranger Division v. Bayne, 214 Neb. 251, 253-54, 333 N.W.2d 891, 893 (1983); Snygg v. City of Scottsbluff Police Dep't., 201 Neb. 16, 21, 266 N.W.2d 76, 79 (1978).

123. NEB. REV. STAT. § 48-1120(6) (1978). The attorneys' fee provision has not yet been subject to litigation. It is relatively clear from the statute's language, however, that attorneys' fees will be available only if appeal is made to the district court; conversely, attorneys' fees will not be available if the proceeding concludes prior to appeal to the district court. *Cf.* New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980). The statute's language may also be read to restrict attorneys' fees to work done as part of the appeal to district court. *See* Farmer v. Richman Gordman Stores, Inc., 203 Neb. 222, 226, 278 N.W.2d 332, 334 (1979) ("The appellee is allowed a fee of $500 *for services in this court*.") (emphasis added). The courts have discretion in allowing attorneys' fees and should exercise that discretion, as the federal courts have, to allow attorneys' fees to most prevailing charging parties, but to disallow attorneys' fees to most prevailing respondents. *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

124. OMAHA, NEB., MUN. CODE § 13-199 (1980); OMAHA BD. RULES ch. 6, rule 3-1(a) (1981). The Director and the respondent are parties to the proceeding before the Omaha Commission. OMAHA, NEB., MUN. CODE § 13-159 (1980); OMAHA BD. RULES ch. 5, rule 4-4(a) (1981). The charging party is not necessarily a party, but "may be allowed to intervene." OMAHA, NEB., MUN. CODE § 13-159 (1980); OMAHA BD. RULES ch. 5, rule 4-4(b) (1981). Thus, if the charging party does not intervene, she will not be a party and will, as a result, not be able to seek judicial review of an adverse decision. The Hearing Examiner may also allow "any other person" to intervene. OMAHA, NEB., MUN. CODE § 13-159 (1980); OMAHA BD. RULES ch. 5, rule 4-4(c) (1981). To seek judicial review, a party must "claim . . . to be aggrieved." OMAHA, NEB., MUN. CODE § 13-199

peal the Omaha Commission's decision by filing a petition in error in the district court.[125] To obtain substantive review, the petition in error must be filed within thirty days of the Omaha Commission's final order.[126] If a timely petition in error is not filed in the district court, the Director may obtain judicial enforcement of the Omaha Commission's order upon a minimal showing of jurisdiction.[127]

The district court's review in an error proceeding is based upon the record developed before the Hearing Examiner.[128] The district court's scope of review, however, is more limited than under the Nebraska FEPA. The district court must affirm the Omaha Commission if the Commission has acted within its jurisdiction and there is some competent evidence to sustain its findings.[129]

The Lincoln FEPO provisions on judicial review are cryptic.[130] The review, however, should take place under the special appeals provision for cities of the primary class.[131] The party appealing must file a notice of appeal with the city clerk within thirty days of the adverse decision[132] and a petition in the district court within fifty days of the adverse decision.[133] The scope of review, like the scope of review under the Nebraska FEPA,[134] is quite broad.[135]

(1980); OMAHA BD. RULES ch. 6, rule 3-1(a) (1981). If this standard is, as it seems to be, something less than being actually aggrieved, *cf.* NEB. REV. STAT. § 48-1120(1) (1978), judicial review may be more readily available under the Omaha FEPO than under the Nebraska FEPA. *See supra* note 113.

125. OMAHA, NEB., MUN. CODE § 13-199 (1980); OMAHA BD. RULES ch. 6, rule 3-1(a) (1981). *See* NEB. REV. STAT. §§ 25-1901 to 25-1910 (1979).

126. OMAHA, NEB., MUN. CODE § 13-200 (1980); OMAHA BD. RULES ch. 6, rule 3-1(b) (1981).

127. OMAHA, NEB., MUN. CODE § 13-201 (1980); OMAHA BD. RULES ch. 6, rule 3-2(a) (1981).

128. Dovel v. School Dist. No. 23, 166 Neb. 548, 553, 90 N.W.2d 58, 62 (1958).

129. City of Omaha Human Relations Dep't. v. City Wide Rock & Excavation Co., 201 Neb. 405, 407, 268 N.W.2d 98, 100 (1978).

130. LINCOLN, NEB., MUN. CODE § 11.02.070(i) (1980) provides: "Such orders of the [Lincoln Commission] may be appealed to the district court for Lancaster County as provided by law."

131. NEB. REV. STAT. §§ 15-1201 to 15-1205 (1977). *See* American Stores Packing Co. v. Jordan, 213 Neb. 213, 218, 328 N.W.2d 756, 759 (1982).

132. NEB. REV. STAT. § 15-1202 (1977).

133. NEB. REV. STAT. § 15-1204 (1977). By regulation, the Lincoln Commission has provided that, if a timely review action is not filed, the Commission may obtain enforcement of its decision and order upon a minimal showing of jurisdiction. LINCOLN RULES, rule 12-2 (1982). The Lincoln Commission has explicitly been given the authority to promulgate rules and regulations. LINCOLN, NEB., MUN. CODE § 11.02.040(c)(4) (1980). Consequently, its rules are substantive and should be granted the force and effect of law. *See* Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977). *But see* LINCOLN RULES, rules 12-1(a) to 12-1(b) (1982) (indicating erroneous appeal procedure and time limits).

134. *See supra* notes 118-21 and accompanying text.

135. NEB. REV. STAT. § 15-1205 (1977) provides that the district court shall "deter-

If conciliation fails in Grand Island, the Grand Island Commission may commence an action on behalf of the charging party in district court.[136] Thus, the adjudicatory hearing under the Grand Island FEPO is conducted in state court.

III. COORDINATION OF STATE AND LOCAL PROCEDURES[137]

To explore the question of how state and local procedures are coordinated, let us consider this example. Complainant files a charge with the state NEOC. At some point in the proceeding—whether after a reasonable cause determination, or after the administrative hearing, or even after a court decision—the complainant decides to abandon the state procedure and file a charge with the Lincoln Commission. What effect should the determinations in the state procedure have on the local agency? Similarly, what effect should prior local determinations have on the state agency? This section will address these questions.

A. Administrative Coordination

By statute,[138] the state has attempted to coordinate the efforts of state and local agencies. The NEOC, however, does not follow the statute. Instead, it follows a regulation[139] which makes the preclusive effect of prior decisions much less clear.

By statute, the NEOC may refer all charges to an appropriate

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mine anew all questions raised before the city." One district court, with the apparent acquiescence of the Nebraska Supreme Court, has interpreted this to require a trial de novo upon the record developed before the Lincoln Commission. American Stores Packing Co. v. Jordan, 213 Neb. 213, 217, 328 N.W.2d 756, 758 (1982). If that is correct, the scope of review would be identical to that under the Nebraska FEPA. *See supra* notes 118-21 and accompanying text. The "determine anew" language, however, could be read to authorize even broader judicial review. That is, it could be interpreted to permit the introduction of new evidence at the district court level.

136. GRAND ISLAND, NEB., MUN. CODE § 37-14 (1981).

137. Section III considers only the interrelationship of the state and local fair employment practices laws. Federal law, obviously, provides a claimant with still another possible forum. Title VII and its procedural relationship with Nebraska's state and local laws will be discussed in Part Two of this Article. *See supra* note 22 and accompanying text.

138. NEB. REV. STAT. § 20-113 (Supp. 1982).

139. Rule 2-2(d), NEOC, 6 NEB. ADMIN. R. 2-4 (1977). In areas outside of the primary scope of this Article, the Lincoln FEPO coordinates state and local procedures. LINCOLN, NEB., MUN. CODE § 11.01.050 (1980) provides that the Lincoln Commission will not process a charge if a civil action is filed under NEB. REV. STAT. § 20-119 (1977) (housing discrimination) or NEB. REV. STAT. § 48-1008 (1978) (age discrimination in employment).

local agency.[140] Once it does so, the NEOC is to "take no further action . . . if the local agency proceeds promptly to handle [the charge]."[141] The NEOC would only consider a referred charge if it determines that the "local agency is not handling a complaint with reasonable promptness, or that the protection of the rights of the parties or the interests of justice requires such action."[142] Thus, the local agency would initially resolve all charges filed within its jurisdiction. The state would intervene only when necessary to vindicate the state's interest.[143] For example, the state would intervene when the local agency, because of inadequate funding or for other reasons, was unable to promptly deal with its case load; when there was reason to believe the local agency may be biased against a particular complainant or respondent; or when the local ordinance did not provide the substantive protection of the state statute.[144] The NEOC should promulgate a procedural regulation which would permit complainants to petition the NEOC for state intervention and NEOC determinations on these petitions should be subject to judicial review.[145]

The statute, if followed, would effectuate an acceptable coordination of state and local procedures.[146] The procedures, both state and local, provide comparable procedural protections. They all conclude with consideration by the district court.[147] The procedure required by the statute strikes a reasonable balance between an efficient allocation of enforcement resources and adequate protection of state interests.

The NEOC, however, does not follow the dictates of the statute. In practice, the place of filing determines the agency that will conduct the initial processing. If a charge is initially filed with the NEOC, the local agency will generally defer to the NEOC. If a charge is initially filed with a local agency, the NEOC will refrain from processing the charge until the local agency has completed its investigation and made a reasonable cause determination.[148]

140. NEB. REV. STAT. § 20-113 (Supp. 1982).
141. *Id.*
142. *Id.*
143. *See infra* notes 193-94 & 199-200 and accompanying text.
144. The Grand Island FEPO, for example, does not have a provision on discrimination in apprenticeship or training programs or a provision protecting against employer retaliation. *See supra* note 11. The state, then, would have to act on charges in those areas.
145. *Cf. supra* notes 63-70 and accompanying text.
146. *See infra* note 200 and accompanying text.
147. As noted above, however, judicial review of decisions of the Omaha FEPO is based upon a more deferential standard than judicial review of NEOC decisions. *See supra* text accompanying notes 128-29. This factor may, in appropriate cases, justify state intervention.
148. Rule 2-2(d)(1), NEOC, 6 NEB. ADMIN. R. 2-4 (1977).

The NEOC then "accord[s] substantial weight" to the findings of the local agency.[149] The NEOC may agree with a local agency's finding of reasonable cause and either adopt the local agency's conciliation of the charge[150] or commence its own conciliation process.[151] Similarly, the NEOC may agree with a local agency's finding of no reasonable cause and dismiss a charge[152] or disagree with such a finding and begin its own investigation.[153]

This is not a very efficient administrative coordination of efforts. Charges are not channelled to an agency for initial processing.[154] Instead, since the place of filing determines which agency will conduct the initial processing, the charging party makes the determination. Moreover, the administrative coordination probably does not avoid duplication to the extent contemplated by the statute.[155]

The NEOC practice, then, requires consideration of another mechanism for coordinating state and local procedures.[156]

B. Issue and Claim Preclusion

The state and local procedures may also be coordinated by preclusion doctrines.[157] Under res judicata or claim preclusion,[158] a

149. *Id.* at rule 2-2(d)(2).
150. *Id.* at rule 2-2(d)(4).
151. *Id.* at rule 2-2(d)(3).
152. *Id.* at rule 2-2(d)(5).
153. *Id.* at rule 2-2(d)(5).
154. *Cf.* Title VII, § 706(c)-(d), 42 U.S.C. § 2000e-5(c)-(d) (1976) (requires state or local consideration of the charge before federal agency considers the charge).
155. If the NEOC interprets "substantial weight" so as to preclude state intervention unless "the rights of the parties or the interests of justice" require intervention, NEB. REV. STAT. § 20-113 (Supp. 1982), the NEOC's regulation will avoid duplication to the same extent as the statute. It seems more likely, however, that the "substantial evidence" standard permits more liberal state intervention and, consequently, results in greater duplication.
156. Even if the NEOC followed the statute, a consideration of preclusion doctrines would be required. Federal courts considering discrimination claims must give "the same preclusive effect to state court judgments that those judgments would be given in the courts of the state from which the judgments emerged." Kremer v. Chemical Constr. Corp., 102 S. Ct. 1883, 1889 (1982). Thus, the preclusive effect of state determinations will be important in determining the coordination between the state procedures and Title VII. This issue will be more fully discussed in Part Two of this Article.
157. This Article is primarily concerned with coordination of the procedures of Title VII, the Nebraska FEPA, and local fair employment practices ordinances. Preclusion plays a role in that coordination. Preclusion may also play a role where other agencies decide claims or issues relevant to a subsequent discrimination charge. Assume, for example, that a teacher tenure panel, after a hearing, upholds the dismissal of a tenured teacher and that the determination is affirmed on appeal in state court. Assume further that the dismissed teacher then files a charge with the state fair employment practices commission. Should the prior determination of the teacher tenure

final judgment on the merits of an action precludes the parties from relitigating claims that were or could have been raised in that action.[159] Collateral estoppel or issue preclusion prevents relitigation of issues that were actually and necessarily litigated in a prior proceeding.[160] Thus, a decision by a local agency or district court under a local ordinance may preclude a subsequent action under the Nebraska FEPA, or vice versa. The courts, however, have not considered and, hence, have provided little guidance on the application of preclusion doctrines to employment discrimination cases in Nebraska. Consequently, to determine how Nebraska's preclusion doctrines should be applied in this area, it is necessary to examine the purposes of preclusion doctrines and the purposes of multiple forums in employment discrimination cases.[161]

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panel preclude commission consideration of the discrimination charge? *See* Umberfield v. School Dist. 11, 185 Colo. 165, 522 P.2d 730 (1974) (yes). *See also* McCorison v. Boosalis, No. CV82-L-80 (D. Neb. Feb. 15, 1983) (decision of Nebraska Department of Labor, enforced in state court, precludes a subsequent Title VII action). This Article will not directly consider preclusion issues where agencies other than antidiscrimination agencies made the initial determination. Nevertheless, a substantial portion of the discussion herein should be applicable to situations like the one postulated. *See* Colorado Springs Coach Co. v. State Civil Rights Comm'n, 35 Colo. App. 378, 536 P.2d 837 (1975); Note, *Administrative Law—Res Judicata—Application of Res Judicata to Agencies with Parallel Jurisdiction*, 52 DEN. L.J. 595 (1975); *see generally* Vestal & Hill, *Preclusion in Labor Controversies*, 35 OKLA. L. REV. 281, 323-27 (1982).

158. "The law of former adjudication is frought with confused terminology." Holland, *Modernizing Res Judicata: Reflections on the Parklane Doctrine*, 55 IND. L.J. 616, 615 (1980). "Res judicata" is used by some commentators to refer to both issue and claim preclusion and by other commentators to refer only to claim preclusion. *Compare* 1B J. MOORE & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.441[2], at 3775-76 (2d ed. 1982) [hereinafter cited as MOORE'S FEDERAL PRACTICE] *with* RESTATEMENT (SECOND) OF JUDGMENTS ch. 3 introductory note at 131 (1982). *See generally* 18 C. WRIGHT, A. MILLER & G. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4402 (1981) [hereinafter cited as FEDERAL PRACTICE]. This Article will use the terms "claim preclusion" and "issue preclusion" as indicated below, *see infra* text accompanying notes 159-60, and the term "preclusion doctrines" to refer to both claim and issue preclusion.

159. *See* Thomas v. Weller, 204 Neb. 298, 301-02, 281 N.W.2d 790, 792 (1979); Bank of Mead v. St. Paul Fire & Marine Ins. Co., 202 Neb. 403, 406, 275 N.W.2d 822, 824-25 (1979); Wischmann v. Raikes, 168 Neb. 728, 738, 97 N.W.2d 551, 557 (1959). *See also* Kremer v. Chemical Constr. Corp., 102 S. Ct. 1883, 1889-90 n.6 (1982); Allen v. McCurry, 449 U.S. 90, 94 (1980); Allen v. County of Sac, 94 U.S. 351, 352 (1876); RESTATEMENT (SECOND) OF JUDGMENTS §§ 17-26 (1982).

160. *See* Kremer v. Chemical Constr. Corp., 102 S. Ct. 1883, 1889-90 n.6 (1982); Montana v. United States, 440 U.S. 147, 153 (1979); Parklane Hosiery v. Shore, 439 U.S. 322, 326 n.5 (1978); RESTATEMENT (SECOND) OF JUDGMENTS §§ 17, 27-29 (1982).

161. While preclusion rules were at one time doctrines "of finality expressed and implemented through a cluster of axiomatic rules of law specific in form, ab-

1. The Purposes of Preclusion Doctrines

Preclusion doctrines foreclose investigations into the truth.[162] An argument that a first judgment should be disregarded because it is wrong will ordinarily fall victim to an assertion of preclusion.[163] Viewed in this manner, preclusion doctrines are different and more dangerous than most other procedural rules. Most procedural rules are intended to enhance, or at least contribute to, the process of truth-finding;[164] preclusion rules prohibit that process.[165] The central issue, then, in any discussion of the rationale of preclusion doctrines is whether the purposes of the doctrines

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solute in force, and mandatory in application," Holland, *supra* note 158, at 616, that is no longer true. Preclusion rules are now flexible doctrines that bend in response to competing interests. Spilker v. Hankin, 188 F.2d 35, 39 (D.C. Cir. 1951); Greenfield v. Mather, 32 Cal. 2d 23, 35, 194 P.2d 1, 8 (1948). *See also* Parklane Hosiery Co., v. Shore, 439 U.S. 322, 331 (1979) (trial courts have broad discretion to determine when issue preclusion should be applied). *See generally* Comment, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations*, 53 VA. L. REV. 1360, 1361-63 (1967). Consequently, to determine the applicability of preclusion rules to employment discrimination cases, it is necessary to examine the competing interests in the area.

162. Griswold, *Res Judicata in Federal Tax Cases*, 46 YALE L.J. 1320, 1320 (1937).

163. *See, e.g.*, Morimoto v. Nebraska Children's Home Soc'y, 176 Neb. 403, 407-08, 126 N.W.2d 184, 188 (1964); Schleuning v. Tatro, 122 Neb. 3, 7, 238 N.W. 741, 743 (1931); Kazebeer v. Nunemaher, 82 Neb. 732, 735-36, 118 N.W. 646, 648 (1908); Boasen v. State, 47 Neb. 245, 246-47, 66 N.W. 303, 304 (1896). *See also* Federated Dep't. Stores v. Moitie, 452 U.S. 394, 398 (1981); Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 325 (1927); Deposit Bank v. Frankfort, 191 U.S. 499, 510-11 (1903); Westwood Chem. Co. v. Kulick, 656 F.2d 1224, 1231 (6th Cir. 1981); Kemp v. Birmingham News Co., 608 F.2d 1049, 1052 (5th Cir. 1979); Mitchell v. National Broadcasting Co., 553 F.2d 265, 272 (2nd Cir. 1977).

164. Clearly, not all procedural rules are intended solely to enhance the truth-finding process. Some rules have purposes in addition to truth-finding enhancement. For example, necessary parties, intervention, and interpleader rules are intended, in part, to avoid the imposition of conflicting legal obligations on a single individual. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968) (necessary parties rule); Cascade Natural Gas Co. v. El Paso Natural Gas Co., 368 U.S. 129 (1967) (intervention rule); State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967) (interpleader rule). *See* Hazard, *Res Nova in Res Judicata*, 44 S. CAL. L. REV. 1036, 1042 n.16 (1971). Moreover, some rules directly interfere with the truth-finding process. *See, e.g.*, Weeks v. United States, 232 U.S. 383 (1914) (illegally seized evidence may not be used in federal courts); Mapp v. Ohio, 367 U.S. 643 (1961) (illegally seized evidence may not be used in state courts); United States v. Reynolds, 345 U.S. 1 (1953) (privilege for state secrets is recognized); FED. R. EVID. 605 (judge may not be a witness); FED. R. EVID. 503 (attorney-client privilege). Despite this, it is true that most procedural rules are intended to enhance the truth-finding process. Rules that do not do so, such as various exclusionary rules, also raise the issue of whether their purposes outweigh their interference with truth-finding.

165. Preclusion rules prohibit any inquiry into the truth. Other procedural rules which inhibit truth-finding processes, *see supra* note 164, do so in a more lim-

outweigh the doctrines' prohibition of truth-finding in a particular area.[166]

The Nebraska Supreme Court[167] has succinctly stated the purposes of preclusion rules: "[Preclusion rules are] grounded, first, on a public policy and the necessity to terminate litigation, and, second, on the belief that a person should not be vexed more than once for the same cause."[168] Stated in that way, the purposes of preclusion doctrines in Nebraska mirror the purposes generally recited for preclusion doctrines.[169] To facilitate the necessary balancing of competing interests,[170] however, the purposes must be stated with more precision.

The core purpose of preclusion doctrines, reflected in the Nebraska Supreme Court's cryptic statement, is to "put . . . an end to litigation."[171] "[F]airness to the defendant, and sound judicial administration, require that at some point litigation over [a] particular controversy come to an end."[172] Thus stated, the preclusion rules provide protection, security, and incentives.

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ited fashion; they will, for example, exclude certain evidence, but allow the process to continue on the basis of other evidence.

166. *See* Griswold, *supra* note 162, at 1355. Some commentators have argued that the burden should be reversed. That is, that preclusion doctrines should generally apply unless there is present an overriding, competing principle of public policy. *See, e.g.*, MOORE'S FEDERAL PRACTICE, *supra* note 158, at ¶ 0.405[1]-0.495[12]; Hazard, *supra* note 164, at 1043-44. I would agree if the primary goal were repose. Accepting repose as the primary goal, though, begs the question. The question is whether the goals supporting the preclusion doctrines, including predominantly the goal of repose, override competing goals, such as truth-seeking or conciliation. And a predominant goal of all procedural rules, I would submit, is truth-seeking.

167. The development of preclusion doctrines has been largely judicial in origin. FEDERAL PRACTICE, *supra* note 158, at § 4403; Comment, *Res Judicata in Administrative Law*, 47 YALE L.J. 1250, 1251 (1940). Consequently, the Nebraska Supreme Court is the best source of the policies supporting preclusion doctrines in Nebraska.

168. DeCosta Sporting Goods, Inc. v. Kirkland, 210 Neb. 815, 819, 316 N.W.2d 772, 775 (1982). *See also* Gaspar v. Flott, 209 Neb. 260, 262-63, 307 N.W.2d 500, 502 (1981); Vantage Enter., Inc. v. Caldwell, 196 Neb. 671, 675, 244 N.W.2d 678, 680 (1976); Norlanco, Inc. v. County of Madison, 186 Neb. 100, 105, 181 N.W.2d 119, 122 (1970); American Province Real Estate Corp. v. Metropolitan Util. Dist., 178 Neb. 348, 351, 133 N.W.2d 466, 468 (1965).

169. *See* Brown v. Felsen, 442 U.S. 127, 131 (1979); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979); United States v. Throckmorton, 98 U.S. 61, 65 (1878). *See generally* Vestal & Hill, *supra* note 157, at 296-303.

170. *See supra* note 161.

171. RESTATEMENT OF JUDGMENTS § 1 comment a (1942).

172. RESTATEMENT (SECOND) OF JUDGMENTS § 19 comment a (1982). *See also* Kremer v. Chemical Constr. Corp., 102 S. Ct. 1883, 1889-90 n.6 (1982); FEDERAL PRACTICE, *supra* note 158, § 4403, at 15-17; MOORE'S FEDERAL PRACTICE, *supra* note 158, ¶ 0.405, at 628-29; Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 325 (1978).

Victorious parties are protected against "oppression by a wealthy, wishful or even paranoid adversary."[173] Moreover, it has been argued that unsuccessful parties are protected against their own folly in making a second attempt.[174] There are, of course, other ways of protecting against harassment through litigation,[175] especially in employment discrimination cases.[176] To the extent these methods are effective, the protection afforded by preclusion rules becomes less necessary.

Preclusion rules also provide security. They free litigants from "the uncertain prospect of [continuing] litigation, with all its costs to emotional peace and the ordering of future affairs."[177] It is not self-evident, however, that this interest in security should always override the interest in reaching correct results through appropriate procedures. There is a recognition in the preclusion rules themselves that continued litigation should not be foreclosed where the procedures utilized in the first action were inadequate[178] or where there is a statutory policy against foreclosure.[179]

Finally, preclusion rules encourage the parties to fully and efficiently litigate the relevant issues in the first action.[180] It may be, though, that under some statutory schemes, a full litigation in the first action is neither necessary nor economical.[181]

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173. FEDERAL PRACTICE, *supra* note 158, § 4403, at 14. *See* Vantage Enter., Inc. v. Caldwell, 196 Neb. 671, 677, 244 N.W.2d 678, 682 (1976). *See also* Kremer v. Chemical Constr. Corp., 102 S. Ct. 1883, 1889-90 n.6 (1982); Allen v. McCurry, 449 U.S. 90, 94 (1980); Brown v. Felsen, 442 U.S. 127, 131 (1979); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979).

174. Blonder-Tongue Laboratories, Inc. v. University of Illinois Found., 402 U.S. 313, 338 (1971). *See* FEDERAL PRACTICE, *supra* note 158, § 4403, at 14. The blatant paternalism of this justification displays little respect for parties or their counsel.

175. Johnson v. First National Bank & Trust Co., 207 Neb. 521, 300 N.W.2d 10 (1980); McCormick Harvesting Mach. Co. v. Willan, 63 Neb. 391, 88 N.W. 497 (1901). *See* Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339, 347-48 (1948). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 120-21 (1971).

176. The Nebraska FEPA and Title VII provide for an award of attorneys' fees to a prevailing party. NEB. REV. STAT. § 48-1120(6) (1978); Title VII, § 706(k), 42 U.S.C. § 2000e-5(k) (1976). *See supra* note 123.

177. FEDERAL PRACTICE, *supra* note 158, § 4403, at 15. *See also* Cleary, *supra* note 175, at 345-46.

178. *See* Kremer v. Chemical Constr. Corp., 102 S. Ct. 1883, 1897 (1982); Allen v. McCurry, 449 U.S. 90, 95 (1980); Montana v. United States, 440 U.S. 147, 153, 164 n.11 (1979); Blonder-Tongue Laboratories, Inc. v. University of Illinois Found., 402 U.S. 313, 328-29 (1971). *See also* RESTATEMENT (SECOND) OF JUDGMENTS §§ 28(3), 28(5), 83(2), 84(3)(b) (1982).

179. RESTATEMENT (SECOND) OF JUDGMENTS §§ 83(4), 84(3)(a), 86 (1982). *Cf.* Kremer v. Chemical Constr. Corp., 102 S. Ct. 1883, 1890 (1982); Allen v. McCurry, 449 U.S. 90, 98-101 (1980).

180. FEDERAL PRACTICE, *supra* note 158, § 4403, at 14-15.

181. *See infra* notes 201-03 and accompanying text.

In addition to the interests in repose noted above, the preclusion doctrines may also further two, primarily public, interests:[182]

> [Preclusion doctrines preserve] the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results. It is easier to live with the abstract knowledge that our imperfect trial processes would often produce opposite results in successive efforts than to accept repeated concrete realization of that fact.[183]

Despite this, preclusion doctrines have "little direct relevance to maintaining 'public confidence' in the courts."[184] The appeals processes themselves lead to "repeated concrete realizations" of inconsistent results. Indeed, inconsistencies revealed through reversals on appeal should lead to more "corrosive disrespect" than reversals based upon the development of a new record; the new record, at least, provides an explanation for inconsistencies other than the whims of the decisionmaker. It may be, though, that the concern is not merely with inconsistencies, but rather with conflicting legal obligations.[185] If that is the case, the preclusion doctrines should be tailored to preclude relitigation only where conflicting legal obligations are possible or likely.[186]

A second public policy is the preservation of court time.[187] Preclusion rules may serve as a device for allocating scarce judicial

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182. These public interests are relatively weak justifications for preclusion rules. Preclusion may be waived by the parties and this "suggests that the needs of judicial administration are, at best, of subsidiary value" as a policy basis for preclusion rules. Technograph Printed Circuits, Ltd. v. United States, 372 F.2d 969, 977 (Ct. Cl. 1967). *See* FEDERAL PRACTICE, *supra* note 158, §§ 4403-04.

183. FEDERAL PRACTICE, *supra* note 158, § 4403, at 12. *See also* Montana v. United States, 440 U.S. 147, 153-54 (1979); Semler v. Psychiatric Inst. of Washington, 575 F.2d 922, 927 (D.C. Cir. 1978). *See generally* George, *Sweet Uses of Adversity: Parklane Hosiery and the Collateral Class Action*, 32 STAN. L. REV. 655, 674-81 (1980); Cleary, *supra* note 175, at 345-46.

184. Hazard, *supra* note 164, at 1041.

185. Dunlap v. City of Chicago, 435 F. Supp. 1295, 1298 (D.C. Ill. 1977). *See* Hazard, *supra* note 164, at 1042.

186. Successive employment discrimination cases rarely present the possibility of conflicting legal obligations. A decision in favor of an employer does not result in an order that the employer *shall* not pay, but rather an order that the employer *need* not pay. A subsequent decision on the same claim in favor of an employee would not, then, result in a conflicting legal obligation. There would be a conflict in result, but not in the legal obligations imposed on the employer. In rare cases, however, the possibility of conflicting legal obligations may arise which would justify the use of preclusion doctrines. Los Angeles Dep't. of Water & Power v. Manhart, 435 U.S. 702, 707-11 & n.20 (1978). *See* M. ZIMMER, C. SULLIVAN & R. RICHARDS, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 254 n.2 (1982).

187. *See, e.g.*, Allen v. McCurry, 449 U.S. 90, 94 (1980); Montana v. United States, 440 U.S. 147, 153 (1979); Schmieder v. Hall, 545 F.2d 768, 771 (2nd Cir. 1976), *cert. denied*, 430 U.S. 955 (1977); Walker v. Chase, 53 Me. 258, 260 (1865); Vantage Enter., Inc. v. Caldwell, 196 Neb. 671, 677, 244 N.W.2d 678, 682 (1976).

resources. However, this policy base for the preclusion doctrines has not been well received by the commentators:

> On its face, this argument does not go far toward explaining why society should not bear the costs of reaching a correct result. In addition, it suffers from the lack of any persuasive showing that so many lawyers or clients are so foolhardy that the total workload of the courts would be augmented appreciably by repeated recourse to the hazards of litigation.[188]

2. *The Purposes of Multiple Forums in Employment Discrimination Cases*

The reasons for multiple forums in employment discrimination cases is not an issue that has caught the fancy of commentators.[189] Nevertheless, it is an important issue in deciding how these forums should interrelate and, particularly, in deciding how preclusion rules should be applied in the area.[190]

Multiple forums in employment discrimination cases arose primarily out of the tension between the desire to preserve and encourage local involvement in the antidiscrimination effort and the need to ensure an adequate national response to the problem. Title VII, then, preserves local involvement by requiring initial resort to local fair employment practices agencies:[191] "[M]any States already have functioning antidiscrimination programs to insure . . . equal employment opportunity. [Title VII seeks] to guarantee that these states—and other States which may establish such programs—will be given every opportunity to employ their expertise and experience without premature interference by the Federal Government."[192] At the same time, the drafters of Title VII real-

188. FEDERAL PRACTICE, *supra* note 158, § 4403, at 13-14. *See* Cleary, *supra* note 175, at 348.

189. Despite the problems created by multiple forums, only a few commentators have discussed the reasons for the phenomenon. *See* M. SOVERN, *supra* note 59, at 91-93; Jackson, Matheson & Piskorski, *The Proper Role of Res Judicata and Collateral Estoppel in Title VII Suits*, 79 MICH. L. REV. 1485, 1493-97 (1981) [hereinafter referred to as *Proper Role*]; Purdy, *Title VII: Relationships and Effect of State Action*, 7 B.C. INDUS. & COM. L. REV. 525 (1966); Comment, *Enforcement of Fair Employment Under the Civil Rights Act of 1964*, 32 U. CHI. L. REV. 430, 442-43 (1965); Note, *Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Act of 1964 and 1968*, 82 HARV. L. REV. 834, 843-44 & n.55 (1969).

190. *See supra* note 161 and accompanying text and *infra* notes 252 & 284 and accompanying text.

191. Title VII, § 706(c)-(d), 42 U.S.C. § 2000e-5(c)-(d) (1976). *See also* Title VII, § 709(b), 42 U.S.C. § 2000e-8(b) (1976). A full discussion of the interrelationship between Title VII and the state and local antidiscrimination laws in Nebraska will appear in Part Two of this Article.

192. 110 CONG. REC. 12725 (1964) (remarks of Sen. Humphrey). In addition to preserving local expertise and experience, initial resort to state agencies was in-

ized that in "many areas effective [local] enforcement is hampered by inadequate legislation, inadequate procedures, or an inadequate budget."[193] Thus, Title VII preserved access to the federal courts under federal law.[194]

The Nebraska FEPA was a testament to the success of Title VII's goal of encouraging local involvement, although not a particularly admirable one. The Nebraska FEPA became law on August 3, 1965,[195] shortly after Title VII became effective:[196]

> [T]he chief motive for State legislators to create a rights agency . . . was the desire to preempt the newly formed Federal agency . . . from exercising direct jurisdiction in the State . . . .
>
> [The legislators] wanted to create a "kept" agency, one that would keep Federal agents out of the State and yet not become too concerned with the rights of minorities.[197]

The Nebraska FEPA's approach to local involvement mirrors the approach of Title VII. An early attempt to totally cede state authority to duly created city commissions was rejected.[198] Instead, the NEOC may refer charges arising in a locality to a local

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tended to increase public acceptance of equal employment opportunity efforts, conserve federal resources, and provide opportunities for experimentation. M. SOVERN, *supra* note 59, at 92-93. *See also* Kremer v. Chemical Constr. Corp., 102 S. Ct. 1883, 1892-93 (1982); 110 CONG. REC. 7214, 7216 (1964) (remarks of Sen. Clark); 110 CONG. REC. 7205 (1964) (remarks of Sen. Clark); *Proper Role, supra* note 189, at 1493-97.

193. 110 CONG. REC. 7205 (1964) (remarks of Sen. Case). *See also* 110 CONG. REC. 13080-81 (1964) (remarks of Sen. Clark); 110 CONG. REC. 6549-50 (1964) (remarks of Sen. Humphrey); *Proper Role, supra* note 189, at 1493-97.

194. Title VII, § 706(c), (f)(1), 42 U.S.C. § 2000e-5(c), (f)(1) (1976). *See Proper Role, supra* note 189, at 1495-96 n.73.

195. 1965 Neb. Laws 782, 798.

196. Title VII went into effect on July 2, 1965, one year after the date of its enactment. Title VII, Pub. L. No. 88-352, § 716(a), 78 Stat. 257 (July 2, 1964).

197. 1975 NEBRASKA ADVISORY COMM., *supra* note 57, at 8. *See id.* at 9-11; 1982 NEBRASKA ADVISORY COMM., *supra* note 59, at 20. This view is certainly supported by remarks made in the floor debate:

> I don't like new commissions . . . but in sixteen days [Title VII] will become the law of the land. . . . [Y]our choice is just this—do you want the people of your own state to be on a commission to rule and regulate this matter or do you want federal people to come in here under federal laws and federal inspections of all kinds and FBI agents to come in here to enforce the law.

Floor Debate on L.B. 656, at 1990 (June 14, 1965) (remarks of Sen. Klauer). *See also* Floor Debate on L.B. 656, at 1987 (June 14, 1965) (remarks of Sen. Batchelder); Floor Debate on L.B. 656, at 1988 (June 14, 1965) (remarks of Sen. Danner); Floor Debate on L.B. 656, at 1989 (June 14, 1965) (remarks of Sen. Carpenter); Floor Debate on L.B. 656, at 1989-90 (June 14, 1965) (remarks of Sen. Mahoney); Floor Debate on L.B. 656, at 1991 (June 14, 1965) (remarks of Sen. Pederson); Floor Debate on L.B. 656, at 1992 (June 14, 1965) (remarks of Sen. Batchelder).

198. L.B. 656, § 11(3), 75th Leg., 1st Sess., 1965 NEB. LEGIS. J. 339 (Feb. 1, 1965), *enacted later in amended form*, 1965 Neb. Laws 782. Compare the proposals

agency and is authorized to take further action only if it determines that the local agency has not acted promptly or sufficiently.[199] Thus, the Nebraska FEPA encourages local involvement by authorizing referral, but retains state agency review to ensure an appropriate response to a statewide concern.[200]

The application of preclusion rules becomes complex in this context. The tension causing the creation of multiple forums cuts in opposite directions. If local fact-finding precludes later state fact-finding, local involvement would be encouraged. Localities would have a great deal of power in regulating employment discrimination. On the other hand, such preclusion would largely undercut the state's ability to review local actions to ensure an appropriate statewide response.

Multiple forums in employment discrimination cases may also be intended to further conciliation. Conciliation is a required step in the procedure of every employment discrimination law in Nebraska.[201] Voluntary settlement is preferred;[202] it avoids disruption and saves time and resources. Strong preclusion rules may conflict with the policy of conciliation. An employer faced with a hearing on a discrimination claim which would preclude all subsequent hearings may be less willing to voluntarily settle than an employer faced with hearings in multiple forums. "[T]he threat of having to account to two agencies may induce businessmen and labor leaders to arrange to deal with only one."[203]

Finally, multiple forums may be an attempt to provide broadly based remedies for a high priority problem:

> In [Title VII], Congress indicated that it considered the policy against discrimination to be of the "highest priority." Consistent with this view, Title VII provides for consideration of employment discrimination claims in several forums. And, in general, submission of a claim to one forum does not preclude a later submission to another.[204]

Thus, multiple forums may be intended to emphasize the impor-

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to make Title VII inapplicable in states that were enforcing adequate fair employment practices laws. 110 CONG. REC. 2727, 2828 (1964).

199. NEB. REV. STAT. § 20-113 (Supp. 1982). *But see supra* notes 148-55 and accompanying text (actual NEOC practice differs).

200. It should be noted that NEB. REV. STAT. § 20-113 (Supp. 1982), was enacted in 1969 by a different legislature than initially enacted the Nebraska FEPA. 1969 Neb. Laws 544.

201. Title VII, § 706(b), 42 U.S.C. § 2000e-5(b) (1976); NEB. REV. STAT. § 48-118(1) (1978); OMAHA, NEB., MUN. CODE § 13-142 (1980); LINCOLN, NEB., MUN. CODE § 11.02.040(c)(8) (1980); GRAND ISLAND, NEB., MUN. CODE § 37-10(b) (1981).

202. *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) ("Cooperation and voluntary compliance were selected as the preferred means for achieving [the] goal [of equal employment opportunity].").

203. Comment, *supra* note 189, at 442. *See also* Note, *supra* note 189, at 843.

204. Alexander v. Gardner-Denver Co., 415 U.S. 36, 47-48 (1974) (citations omitted). *See also* Smouse v. General Elec. Co., 23 Empl. Prac. Dec. (CCH) ¶

tance of the issue and to facilitate an effective resolution of the problem.

3. *Preclusion in Employment Discrimination Cases in Nebraska*

In what circumstances should a complainant be prohibited from pursuing an employment discrimination claim or issue because of the preclusion doctrines? Although the effect of claim and issue preclusion on a complainant's case will often be the same in an employment discrimination case,[205] the two types of preclusion must be dealt with separately since they entail different considerations.

a. Claim Preclusion

Claim preclusion prohibits relitigation of the same cause of action.[206] Thus, if a complainant who has charged and lost under the Nebraska FEPA is pursuing the same cause of action when she files a charge under the Lincoln FEPO, claim preclusion would apply.

31,165 (3rd Cir. 1980); City of Chicago v. Illinois Fair Employment Practices Comm'n, 23 Empl. Prac. Dec. (CCH) ¶ 31,276 (Ill. App. Ct. 1980).

205. Where the state and local issues are the same, claim and issue preclusion will have the same effect on a complainant's case. For example, assume a complainant pursues race and sex discrimination claims in state court under the Nebraska FEPA. The complainant loses on both claims and commences a proceeding under the Lincoln FEPO alleging race and sex discrimination. If preclusion principles apply, both claim and issue preclusion would prevent the complainant from relitigating her race and sex discrimination claims.

Where the state and local issues are different, the distinction between claim and issue preclusion takes on significance. For example, assume our complainant pursues only her race discrimination claim in state court under the Nebraska FEPA. She loses and commences a proceeding under the Lincoln FEPO alleging sex discrimination. If preclusion principles apply, issue preclusion would not prevent the complainant from pursuing her sex discrimination claim. Issue preclusion only prevents relitigation of issues that were actually litigated in a prior proceeding. *See supra* note 160 and accompanying text. Claim preclusion, however, would prevent litigation of the sex discrimination claim. Claim preclusion prevents relitigation of claims that were or could have been raised in the prior action. *See supra* note 159 and accompanying text.

Prior and subsequent lawsuits involving employment discrimination often raise the same issues; as a result, claim and issue preclusion often have the same effect on the subsequent lawsuit. *See, e.g.*, Kremer v. Chemical Constr. Corp., 102 S. Ct. 1883 (1982); Moosavi v. Fairfax County Bd. of Educ., 666 F.2d 58 (4th Cir. 1981); Sinicropi v. Nassau Co., 601 F.2d 60 (2nd Cir.), *cert. denied*, 444 U.S. 983 (1979).

206. Gaspor v. Flott, 209 Neb. 260, 263, 307 N.W.2d 500, 502 (1981); Norlanco, Inc. v. County of Madison, 186 Neb. 100, 106-07, 181 N.W.2d 119, 123 (1970). *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 17, 24 (1982).

The *Restatement (Second) of Judgments* defines a cause of action as a "transaction, or series of connected transactions, out of which the action arose."[207] It goes on to say that what constitutes a transaction or series of transactions is to be determined pragmatically.[208] This broad interpretation of cause of action, which leads to a broad application of claim preclusion, assumes a modern procedural system which liberally permits the consolidation of various substantive or remedial theories relating to a transaction in one lawsuit.[209] With such a procedural system, the parties should be encouraged to resolve all issues arising out of a transaction in a single proceeding.

Our employment discrimination complainant, then, is pursuing the same transaction, or cause of action, in both the state and local forums.[210] The complainant's charges arise out of the same "life-situation."[211] The substantive provisions of the state statute and local ordinance are virtually identical.[212] The facts are the same, as are the relevant witnesses and proofs.[213]

Despite this, claim preclusion should not prohibit our employment discrimination complainant from pursuing a local charge after her state charge has been rejected. As noted, the basis of broad preclusion rules is a procedural system which liberally permits the consolidation of various substantive and remedial theories.[214] The

207. RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982). This definition of cause of action is very broad. *Id.* at § 24 comment a ("[Cause of action,] in the context of res judicata, has never been broader than the transaction to which it related."). Indeed, it may be broader than the definition currently favored by the Nebraska Supreme Court. Gaspor v. Flott, 209 Neb. 260, 263, 307 N.W.2d 500, 502 (1981) (espousing a "primary right" definition of cause of action). *Cf.* RESTATEMENT (SECOND) OF JUDGMENTS § 24 comment a (1982) (number of primary rights irrelevant under transactional approach). *See also* Vantage Enter., Inc. v. Caldwell, 196 Neb. 671, 675-76, 244 N.W.2d 678, 681 (1976). Nevertheless, I consider only the transactional approach. The transactional approach provides the broadest claim preclusion. I conclude that, even under this approach, claim preclusion should not apply to multi-forum employment discrimination claims in Nebraska. Consequently, claim preclusion should not apply *a fortiori* under any of the more restrictive approaches to claim preclusion.

208. RESTATEMENT (SECOND) OF JUDGMENTS § 24(2) (1982).

209. Vantage Enter., Inc. v. Caldwell, 196 Neb. 671, 677-78, 680, 244 N.W.2d 678, 682-83 (1976). *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24 comment a (1982).

210. I am assuming here a complainant who is pursuing the same alleged act of discrimination in both state and local forums.

211. RESTATEMENT (SECOND) OF JUDGMENTS § 24 comment a (1982).

212. *See supra* note 11.

213. RESTATEMENT (SECOND) OF JUDGMENTS § 24 comment b (1982).

214. *See supra* note 209 and accompanying text. *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 26(a)(c) (1982) ("[Claim preclusion does not apply where] plaintiff was unable to rely on a certain theory of the case . . . in the first action because of the limitations on the subject matter jurisdiction of the

procedural system for resolving employment discrimination claims does not do that.[215] The complainant cannot consolidate her claims before a single tribunal. She cannot file or pursue a claim under the Lincoln FEPO before the NEOC, nor can she file or pursue a claim under the Nebraska FEPA before the Lincoln Commission.[216] Claim preclusion simply does not apply to a claim that could not have been raised in the prior tribunal.[217]

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courts or restrictions on their authority to entertain multiple theories . . . ."); *id.* at § 26(1) ("[Claim preclusion does not apply where] it is the sense of the [statutory] scheme that the plaintiff should be permitted to split his claim."). *See generally* Newport News Shipbuilding and Dry Dock Co. v. Director, Office of Workers' Compensation Programs, 583 F.2d 1273, 1278 (4th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979); International Ass'n of Machinists v. Nix, 512 F.2d 125, 131 (5th Cir. 1975); United States v. Pan-American Petroleum Co., 55 F.2d 753, 776-83 (9th Cir. 1932).

215. Instead, the procedural system for resolving employment discrimination claims contains multiple overlapping and independent remedies. *See* Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229, 236-39 (1976); Johnson v. Railway Express Agency, 421 U.S. 454, 459-61 (1975); Alexander v. Gardner-Denver Co., 415 U.S. 36, 47-49 (1974).

216. Generally, the state and local commissions are authorized to accept and resolve charges only under the law they are charged to administer. *See* NEB. REV. STAT. §§ 48-1117 to 48-1119 (1978 & Supp. 1982); OMAHA, NEB., MUN. CODE §§ 13-122, 13-128 (1980); LINCOLN, NEB., MUN. CODE § 11.02.040 (1980); GRAND ISLAND, NEB., MUN. CODE § 37-8 (1981). In a similar fashion, courts may not review under one statutory scheme claims brought before them under another statutory scheme, unless the charging party has exhausted the administrative procedures under the prior scheme. There are no reported cases in which such exhaustion has occurred and a court has considered a state and local claim simultaneously. Moreover, the state and local laws clearly do not contemplate such a simultaneous consideration. Review under the Nebraska FEPA is to be based on the record developed before the NEOC, NEB. REV. STAT. § 48-1120(3) (1978), and review under the local ordinances is usually based on the record developed before the local commission. *See supra* notes 128 & 135 and accompanying text. Neither the state law nor the local ordinances instruct a court on the proper record for judicial review where both state and local claims are raised in one proceeding.

217. *See* Gaspor v. Flott, 209 Neb. 260, 263, 307 N.W.2d 500, 502 (1981); Norlanco, Inc. v. County of Madison, 186 Neb. 100, 106, 181 N.W.2d 119, 123 (1970) ("[Claim preclusion extends to] matters actually determined [and] to other matters which properly could have been raised and determined . . . .").

The majority rule in the federal courts is also that claim preclusion applies only to claims that could have been raised in the prior proceeding. *See, e.g.*, Abramson v. Pennwood Inv. Corp., 392 F.2d 759, 762 (2d Cir. 1968); Hayes v. Solomon, 597 F.2d 958, 984 (5th Cir. 1979); Cream Top Creamery v. Dean Milk Co., 383 F.2d 358, 363 (6th Cir. 1967); Clark v. Watchie, 513 F.2d 994, 997 (9th Cir. 1975). However, there is contrary authority. *See* Nash County Bd. of Educ. v. Biltmore Co., 640 F.2d 484, 487-93 (4th Cir. 1981). *Cf.* Marrese v. American Academy of Orthopaedic Surgeons, 692 F.2d 1083 (7th Cir. 1982), *vacated*, 1982-3 Trade Cas. (CCH) ¶ 65,214 (7th Cir. 1983), *reconsidered*, 1983-1 Trade Cas. (CCH) ¶ 65,365 (7th Cir. 1983) (in its original decision, the Court discussed a claim preclusion issue and applied *Nash*; in its reconsideration, the Court did not decide the claim preclusion issue.). In *Nash*, the plaintiff

b. Issue Preclusion

Issue preclusion prevents relitigation of an issue that was actually litigated and determined in a prior action.[218] In employment discrimination cases, there are determinations at various points in the process: the administrative agency makes a reasonable cause determination, the agency renders a decision after an administrative hearing, and a court makes a ruling after review of the administrative hearing. This section will consider whether issue preclusion should apply at each of these points.

(i) Reasonable Cause Determinations

The state and local procedures all require administrative agencies to make a reasonable cause determination early in the processing of a charge.[219] The reasonable cause determination comes after an investigation by the agency, but before any adversarial hearing.[220] The determination is roughly analogous to a decision to prosecute.

Issue preclusion should not apply to a reasonable cause determination. Issue preclusion should apply only where there has been a full and fair opportunity to litigate the issue.[221] A reasonable cause determination comes before the parties have had any opportunity to litigate. It is intentionally a preliminary and tentative conclusion.[222]

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filed an antitrust action in state court under a state statute that was identical to the Sherman Act, a federal antitrust statute. The plaintiff lost and subsequently filed an action based on the same transaction in federal court under the Sherman Act. The Court held that claim preclusion applied, even though the plaintiff could not have raised the Sherman Act claim in state court. *Nash*, 640 F.2d at 487-93.

It is unlikely that the Nebraska Supreme Court will adopt *Nash's* liberal interpretation of claim preclusion. If it does, however, claim preclusion may apply where the Nebraska FEPA and a local ordinance would apply identically, or very similarly, to a claimant's cause of action. *See Marrese*, 692 F.2d at 1091-92. Even in that situation, though, claim preclusion may not apply for the reasons discussed later in this Article. *See infra* notes 221-227, 239-57 & 284-90 and accompanying text.

218. JED Constr. Co. v. Lilly, 208 Neb. 607, 611-12, 305 N.W.2d 1, 3 (1981); Peterson v. Nebraska Natural Gas Co., 204 Neb. 136, 139, 281 N.W.2d 525, 527 (1979). *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

219. NEB. REV. STAT. § 48-1118(1) (Supp. 1982); OMAHA, NEB., MUN. CODE §§ 13-141, 13-142 (1980); LINCOLN, NEB., MUN. CODE § 11.02.060 (1980); GRAND ISLAND, NEB., MUN. CODE § 37-10 (1981).

220. *See supra* note 219.

221. JED Constr. Co. v. Lilly, 208 Neb. 607, 611-12, 305 N.W.2d 1, 3 (1981); Peterson v. Nebraska Natural Gas Co., 204 Neb. 136, 139, 281 N.W.2d 525, 527 (1979). *See* Montana v. United States, 440 U.S. 147, 164 & n.11 (1979); RESTATEMENT (SECOND) OF JUDGMENTS § 28(5)(c) (1982).

222. Reasonable cause determinations are designed to allocate resources. The

In addition, issue preclusion should not apply to reasonable cause determinations because it would undermine conciliation efforts. Conciliation is a central goal of all employment discrimination procedures in Nebraska.[223] Reasonable cause determinations come before the conciliation effort.[224] To the extent the reasonable cause determination would bind all secondary tribunals,[225] it would lessen incentives to voluntarily settle the case.[226]

Issue preclusion, then, should not apply to reasonable cause determinations.[227]

(ii) Determinations Made After Administrative Hearings

The state and local procedures, except in Grand Island,[228] contemplate an agency determination after an administrative hearing.[229] A proceeding may be abandoned after the agency determination, but before judicial review. If issue preclusion applies, the agency proceeding in such circumstances would be conclusive on the parties in any subsequent collateral proceeding.

The determinations of administrative agencies may, under certain circumstances, be given preclusive effect.[230] Thus, a claim of

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agency conducts an ex parte investigation to determine if the facts warrant a conciliation attempt and further proceedings. A determination of reasonable cause contemplates further proceedings; it is not, and is not intended to be, final. A determination of no reasonable cause is, in effect, a decision not to invest additional public funds in the proceeding.

223. *See supra* note 201 and accompanying text.

224. *See supra* note 219.

225. A reasonable cause determination does not bind the primary tribunal. An NEOC finding of reasonable cause, for example, does not require the NEOC to find a violation of the Nebraska FEPA after a public hearing. It would be anomalous to bind secondary tribunals by a decision which has such a limited effect on the primary tribunal.

226. *See supra* note 202-03 and accompanying text.

227. The reasons discussed for not applying issue preclusion to determinations made after an administrative hearing or after judicial review could also be applied to reasonable cause determinations. *See infra* notes 239-57 and accompanying text.

228. The Grand Island FEPO authorizes the Grand Island Commission to file a civil action in district court if conciliation fails. GRAND ISLAND, NEB., MUN. CODE § 37-14 (1981).

229. NEB. REV. STAT. § 48-1119 (1979); OMAHA, NEB., MUN. CODE §§ 13-156 to 13-171 (1980); LINCOLN, NEB., MUN. CODE § 11.02.070 (1980).

230. "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." United States v. Utah Constr. & Mining Co., 384 U.S. 394, 421-22 (1966). *See* Fisher v. Housing Authority, 214 Neb. 499, 506-07, — N.W.2d — (1983); Schilke v. School Dist. No. 107, 207 Neb. 448, 451, 299 N.W.2d 527, 530 (1980); Richardson v. Board of Educ., 206 Neb. 18, 26, 290 N.W.2d 803, 809 (1980); Ohmart v. Dennis, 188 Neb. 260, 263-64, 196 N.W.2d 181, 184 (1972);

issue preclusion cannot be met with the broad assertion that administrative determinations are not worthy of preclusive effect.[231] Rather, the defense must be more narrowly circumscribed. In this setting, the adequacy of the procedures utilized before the administrative agency[232] and the policies of the statutory scheme must be considered.[233]

The procedures utilized before the antidiscrimination agencies in Nebraska are generally sufficient to justify the application of issue preclusion. Charging parties and respondents are adequately notified of the proceedings.[234] They can present issues through pleadings and briefs.[235] They are afforded discovery rights comparable to those in civil cases.[236] They are given the opportunity to present evidence and argument on their behalf and to rebut evidence and argument presented by opposing parties.[237] There is a point in the proceedings when presentations are concluded and a decision is rendered.[238]

Christensen v. Boss, 179 Neb. 429, 438, 138 N.W.2d 716, 721 (1965). *See also* Kremer v. Chemical Constr. Corp., 102 S. Ct. 1883, 1899 n.26 (1982); United Farm Workers v. Arizona Agr. Employment, 669 F.2d 1249, 1255 (9th Cir. 1982); Bowen v. United States, 570 F.2d 1311, 1321-22 (7th Cir. 1978); Snow v. Nevada Dep't. of Prisons, 543 F. Supp. 752, 755 (D. Nev. 1982). *See generally* RESTATEMENT (SECOND) OF JUDGMENTS § 83 (1982); Groner & Sternstein, *Res Judicata in Federal Administrative Law*, 39 IOWA L. REV. 300, 316 (1954) ("technically the rule remains: there will be no re-trial of issues which were fully litigated as between the same parties and finally disposed of by a competent tribunal. The rule is applicable in administrative law cases . . .").

231. In discussing the issue of the preclusive effect to be given administrative decisions, one commentator has identified the issue as follows: "What sort of decisions have that element of quality or dignity which is essential to make them the basis for a plea of res judicata in subsequent controversies?" Griswold, *supra* note 162, at 1322.

232. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 83(2) (1982).

233. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 83(3)-(4) (1982).

234. NEB. REV. STAT. § 48-1119(1) (1978); Rule 3-6, NEOC, 6 NEB. ADMIN. R. 3-4 (1977); OMAHA, NEB., MUN. CODE § 13-156 to § 13-157 (1980); OMAHA BD. RULES ch. 5, rule 1-3 (1981); LINCOLN, NEB., MUN. CODE § 11.02.070(a) (1980); LINCOLN RULES, rule 4-4(b) (1982).

235. NEB. REV. STAT. § 48-1119(1) (1978); Rule 3-4(e), NEOC, 6 NEB. ADMIN. R. 3-2 (1977); OMAHA, NEB., MUN. CODE § 13-159 (1980); OMAHA BD. RULES ch. 5, rule 5-11(a) (1981); LINCOLN, NEB., MUN. CODE § 11.02.070(d) (1980); LINCOLN RULES, rule 5-12 (1982).

236. NEB. REV. STAT. § 48-1117 (Supp. 1982); Rule 5-1, NEOC, 6 NEB. ADMIN. R. 5-1 (1975); OMAHA, NEB., MUN. CODE § 13-161 (1980); OMAHA BD. RULES ch. 5, rule 5-6 (1981); LINCOLN, NEB., MUN. CODE § 11.02.070(d) (1980); LINCOLN RULES, rule 5-11 (1982).

237. NEB. REV. STAT. § 48-1119(1) (1978); Rule 3-4(e), NEOC, 6 NEB. ADMIN. 3-2 (1977); OMAHA, NEB., MUN. CODE § 13-136 (1980); OMAHA BD. RULES ch. 5, rules 4-6(b), 4-6(d) (1981); LINCOLN, NEB., MUN. CODE § 11.02.070(d) (1980); LINCOLN RULES, rule 5-3 (1982).

238. NEB. REV. STAT. § 48-119(3) (1978); Rule 3-8(a), NEOC, 6 NEB. ADMIN. 3-5 (1977); OMAHA, NEB., MUN. CODE §§ 13-142, 13-141 (1980); OMAHA BD. RULES ch.

The Omaha FEPO, however, presents two possible roadblocks to the application of issue preclusion to determinations of the Omaha Commission. Both roadblocks arise because the Director prosecutes the action and is a formal party to the proceeding;[239] the charging party "*may* be allowed to intervene, present oral testimony or other evidence and examine and cross-examine witnesses."[240] If the charging party does not become a party to the proceeding, issue preclusion may not apply against the charging party (1) because of her lack of control over the proceedings and (2) because of her inability to appeal an adverse determination.

A non-party to a prior proceeding can be precluded in a subsequent proceeding if she had a sufficient measure of control over the prior proceeding.[241] "The measure of control by a nonparty that justifies preclusion . . . is essentially a matter of fact, to be determined by looking for that measure of 'practical control' that makes it fair to impose preclusion."[242] Although the particular

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5, rule 7-1 (1981); LINCOLN, NEB., MUN. CODE § 11.02.070(e), (f) (1980); LINCOLN RULES, rule 9-1 (1982).

239. OMAHA, NEB., MUN. CODE §§ 13-157, 13-159 (1980); OMAHA BD. RULES ch. 5, rules 4-4(a), 4-6(a) (1981).

240. OMAHA, NEB., MUN. CODE § 13-159 (1980) (emphasis added); OMAHA BD. RULES ch. 5, rule 4-4(b) (1981).

241. *See, e.g.*, Hickman v. Southwest Dairy Suppliers, Inc., 194 Neb. 17, 230 N.W.2d 99 (1975); Vincent v. Peter Pan Bakers, Inc., 182 Neb. 206, 153 N.W.2d 849 (1967); Metcalf v. Hartford Accident & Indem. Co., 176 Neb. 468, 126 N.W.2d 471 (1964); Independent Elevators v. Davis, 116 Neb. 397, 217 N.W. 577 (1928). *See also* Montana v. United States, 440 U.S. 147, 154-55 (1979); RESTATEMENT (SECOND) OF JUDGMENTS §§ 39-42 (1982). *See generally* Strom & Strom, *Issue Preclusion and the Concept of Privity*, 15 CREIGHTON L. REV. 117, 123-25 (1981); Comment, *Mutuality of Estoppel: Its Status in Nebraska*, 45 NEB. L. REV. 613, 616-17 (1966).

Traditionally, this issue would be addressed in terms of privity. *See, e.g.*, Schurman v. Pegau, 136 Neb. 628, 636-37, 286 N.W. 921, 925-26 (1939); MOORE'S FEDERAL PRACTICE, *supra* note 158, at ¶ 0.411[1]; Strom & Strom, *supra*, at 123-24. Privity, however, is often not a useful concept, particularly in the area of non-party preclusion. *See* Bruszewski v. United States, 181 F.2d 419, 423 (3rd Cir.), *cert. denied*, 340 U.S. 865 (1950) ("Privity . . . is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata."); MOORE'S FEDERAL PRACTICE, *supra* note 158, ¶ 0.411[6], at 1553. The current trend is to reject the privity nomenclature in favor of more precise descriptions of the relations that might lead to preclusion. Montana v. United States, 440 U.S. 147, 154 n.5 (1979); RESTATEMENT (SECOND) OF JUDGMENTS ch. 1 introduction, at 1, 13-14 (1982); *id.* at §§ 34-61 (rejects privity nomenclature); George, *supra* note 183, at 657; Comment, *The Expanding Scope of the Res Judicata Bar*, 54 TEX. L. REV. 527, 537 (1976). This Article will follow that trend.

242. FEDERAL PRACTICE, *supra* note 158, § 4451, at 429-30. *Compare* Hickman v. Southwest Dairy Suppliers, Inc., 194 Neb. 17, 230 N.W.2d 99 (1975) *and* Schorman v. Pegau, 136 Neb. 628, 636-37, 286 N.W. 921, 925-26 (1939) *with* Metcalf v. Hartford Accident & Indem. Co., 176 Neb. 468, 126 N.W.2d 471 (1964) *and*

facts will have a bearing on the resolution of this issue, in most cases a charging party who is a non-party to the adjudicatory hearing should have a sufficient measure of control to justify preclusion. The charging party certainly has a sufficient interest in the proceeding; the Director is prosecuting the action on behalf of the charging party. The charging party has conclusive, negative control over the proceedings; there are no limits on the withdrawal of a charge.[243] In addition, the charging party has substantial control over the prosecution of the charge; in most cases, the prosecution will be fueled by the charging party's testimony and the other information she is able to supply.[244] Finally, it can be argued that the charging party has been given an opportunity to participate as a party[245] and, consequently, it is not unfair to bind her.[246]

The second possible roadblock arises because only parties to the Omaha Commission proceeding may appeal the Commission's determination.[247] If a non-party complainant loses before the Omaha Commission, it would be unfair to bind her to a decision

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Independent Elevators v. Davis, 116 Neb. 397, 217 N.W. 517 (1928). *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 39 (1982); MOORE'S FEDERAL PRACTICE, *supra* note 158, at ¶ 0.41[6].

243. *See supra* note 78 and accompanying text.

244. *Cf.* Checker Taxi Co. v. National Prod. Worker's Union, 507 F. Supp. 971 (N.D. Ill. 1981) (action before the National Labor Relations Board (NLRB) brought on behalf of charging party by NLRB Regional Director did not preclude later action brought by charging party).

245. OMAHA, NEB., MUN. CODE § 13-159 (1980); OMAHA BD. RULES ch. 5, rule 4-4(b) (1981).

246. Provident Tradesmen Bank & Trust Co. v. Patterson, 390 U.S. 102, 114 (1968) (preclusion should apply to one who has "purposely bypassed an adequate opportunity to intervene"); Metcalf v. Hartford Accident & Indem. Co., 176 Neb. 468, 476, 126 N.W.2d 471, 476 (1964). *See* Comment, *Nonparties and Preclusion by Judgment: The Privity Rule Reconsidered*, 56 CAL. L. REV. 1098 (1968); Note, *Preclusion of Absent Disputants to Compel Intervention*, 79 U. COLO. L. REV. 1551 (1979). Despite this, it is not generally accepted that a non-party may be precluded solely because she bypassed an opportunity to participate:

> The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger . . . . Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights.

Chase Nat'l Bank v. City of Norwalk, 291 U.S. 431, 441 (1934). *See also* Gratiot County State Bank v. Johnson, 249 U.S. 246, 249-50 (1919); Fabricius v. Freeman, 466 F.2d 689, 693 (7th Cir. 1972). *See generally* FEDERAL PRACTICE, *supra* note 158, at § 4452.

247. OMAHA, NEB., MUN. CODE § 13-199 (1980); OMAHA BD. RULES ch. 5, rule 3-1(a) (1981). Although this is stated as a separate consideration because of its separate treatment in the literature, it could be viewed merely as a particular limitation on a non-party's "practical control" that would make it unjust to preclude later actions by that non-party. *See supra* note 242 and accompanying text.

she could not appeal.[248] This is particularly true where the quality of the first tribunal is questionable[249] and where the overall statutory enforcement scheme emphasizes the importance of judicial review.[250] In this circumstance, the charging party's opportunity to participate as a party, should not prejudice her right to judicial review of her claim.[251]

The policies of the statutory enforcement scheme must also be considered to determine the preclusive effect of administrative determinations. If the enforcement scheme permits relitigation of claims, the ordinary preclusion principles should not apply.[252] The Nebraska statutes indicate that the decisions of local tribunals should not preclude state enforcement processes:

> If the [NEOC] determines that a local agency is not handling a complaint with reasonable promptness, or that the protection of the rights of the parties or the interests of justice requires such action, the [NEOC] may regain jurisdiction of the complaint and proceed to handle it in the same manner as other complaints . . . .[253]

This Nebraska statute, then, contemplates rehearing a claim in a state forum that has already been considered in a local forum.[254]

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248. RESTATEMENT (SECOND) OF JUDGMENTS § 28(1) (1982). *See* Dorsey v. Solomon, 435 F. Supp. 725, 741-42 (D. Md. 1977), *modified on other grounds*, 604 F.2d 271 (4th Cir. 1979).

249. Although the *Restatement (Second) of Judgments* indicates that issue preclusion is never appropriate where review is unavailable, *see supra* note 248, other commentators have indicated that "the availability of preclusion should not turn on the absence of appeal alone, but should depend as well on the nature of the first tribunal." FEDERAL PRACTICE, *supra* note 158, § 4434, at 321. The quality of the Omaha Commission is questionable. It is composed of interest group representatives, OMAHA, NEB., MUN. CODE § 13-124 (1980), many or most of whom have no legal training and little experience in the highly complex area of employment discrimination law.

250. *See supra* notes 113-36 and accompanying text.

251. *See supra* note 246.

252. "An adjudicative determination of a claim by an administrative tribunal does not preclude relitigation in another tribunal of the same or a related claim based on the same transaction if the scheme of remedies permits assertion of the second claim notwithstanding the adjudication of the first claim." RESTATEMENT (SECOND) OF JUDGMENTS § 83(3) (1982). *See* Pederson v. Westroads, Inc., 189 Neb. 236, 240, 202 N.W.2d 198, 201 (1972); Lost Creek Drainage Dist. v. Elsam, 188 Neb. 705, 708, 199 N.W.2d 387, 390 (1972). *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 83(4) (1982); FEDERAL PRACTICE, *supra* note 158, § 4475, at 767-68. *See generally* Schopflocher, *The Doctrine of Res Judicata in Administrative Law*, 1942 WIS. L. REV. 198, 212 ("legislative intent as expressed in the enabling statute ought to be the touchstone for ascertaining whether and to what extent an administrative decision has the effect of *res judicata*").

253. NEB. REV. STAT. § 20-113 (Supp. 1982).

254. It could be argued that the NEOC only has the power to rehear charges that have initially been filed with the NEOC and then referred to a local agency. Such a restrictive interpretation of the statute should be rejected. It would create two classes of charges: charges initially filed with a local agency and

The normal preclusion rules do not apply under the statute; rather, the NEOC has the authority to decide whether to rehear a claim based upon the statutory standards.[255] Moreover, in directing the NEOC to handle the claim "in the same manner" as other claims, the statute undermines any claim of preclusion. Hearing a claim "in the same manner" as other claims requires an initial decision based upon a preponderance of the evidence standard[256] and de novo judicial review.[257]

The Nebraska statutes also provide that "the Legislature desires to provide for the local enforcement and enactment of civil rights legislation *concurrent with the authority of the State of Nebraska*."[258] This statute was enacted in response to Nebraska Supreme Court opinions which said that the state had preempted the field of employment discrimination and, consequently, that localities were without authority to act in the area.[259] It can be argued, however, that the statute does more than merely counter state preemption. State preemption could have been countered without the addition of the italicized language. The italicized language acquires independent meaning[260] if the word "concurrent" is interpreted to affect the application of preclusion doctrines.[261]

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charges initially filed with the NEOC. Decisions on the latter charges would be subject to an unrestricted rehearing while decisions on the former charges would have preclusive effect. There is no discernable rationale for such a distinction and, moreover, the local decisions given preclusive effect under such a scheme would undermine the state's supervisory rule in the antidiscrimination effort. *See supra* notes 199-200 and accompanying text.

255. This interpretation of the Nebraska statutes is bolstered by the NEOC's regulations. Rule 2-2(d)(2), NEOC, 6 NEB. ADMIN. R. 2-4 (1977), provides that the NEOC "shall accord substantial weight to the final findings and orders" of the local commissions. It would be anomalous to bind state courts to local determinations that do not bind the NEOC. *Cf.* Kremer v. Chemical Constr. Corp., 102 S. Ct. 1883, 1891 n.7 (1982) (it would be anomalous to bind federal courts to state administrative decisions that do not bind the EEOC).

256. Rules 3-8(b)(iii) to 3-8(b)(v), NEOC, 6 NEB. ADMIN. R. 3-5 to 3-6 (1977).

257. *See supra* notes 118-22 and accompanying text.

258. NEB. REV. STAT. § 20-113.01 (Supp. 1982) (emphasis added).

259. City of Omaha Human Relations Dep't. v. City Wide Rock & Excavating Co., 201 Neb. 405, 408, 268 N.W.2d 98, 101 (1978); Midwest Employers Council, Inc. v. City of Omaha, 177 Neb. 877, 888, 131 N.W.2d 609, 616 (1964).

260. "It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word." Market Co. v. Hoffman, 101 U.S. 112, 115 (1879). *See also* Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 298 (1956) (Frankfurter, J., dissenting).

261. This interpretation of "concurrent" is somewhat persuasive because the word appears in close proximity to other statutory language which exhibits legislative concern with the interrelationship of the state and local procedures. NEB. REV. STAT. § 20-113 (Supp. 1982).

It could be argued that "concurrent" means concurrent in scope with the Nebraska fair employment practices statutes. That interpretation, however, would conflict with other statutory language which allows localities to enact

That is, "concurrent" may mean that the local and state procedures should be allowed to operate over the same subject matter at the same time.[262] The application of preclusion rules in the area would result in procedures that were not operating concurrently because then one procedure would preempt the other.[263] Interpreted this way, the statute, in contrast to the earlier one,[264] indicates that preclusion should not operate either way: Local decisions should not preclude later state determinations, nor should state decisions preclude later local determinations. This argument, however, should be rejected. Generally if two courts have "concurrent" jurisdiction, "a judgment in either court will . . . have complete res judicata effect in the other."[265] Thus, charging parties may resort in the first instance to either the state or local agency, but once that choice is made, this statute does not alter normal application of the preclusion rules.[266]

In summary, local agency determinations of employment discrimination claims in Nebraska should not be given preclusion effect in subsequent state proceedings, but state agency determinations on such claims should be given preclusive effect in subsequent local proceedings. This interpretation of the Nebraska statutes is supported by the rationale of multiple forums. The statutes, if followed,[267] encourage local involvement in the antidis-

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laws "more comprehensive than" the state law. NEB. REV. STAT. § 20-113 (Supp. 1982). This conflict is particularly unacceptable because the same legislative bill, L.B. 438, 1979 Neb. Laws 1225, contained both the "concurrent" language and the "more comprehensive than" language, and because it is unnecessary.

262. *See* Rogers v. Bonnett, 2 Okla. 553, 556, 37 P. 1078, 1079 (1894). *See also*, WEBSTER'S NEW COLLEGIATE DICTIONARY 234 (1976).

263. *Cf.* State v. Stueve, 260 Iowa 10234, 1030-31, 150 N.W.2d 597, 602 (1967).

264. NEB. REV. STAT. § 20-113 (Supp. 1982) indicates only that the decisions of local tribunals should not preclude state enforcement processes. *See supra* note 254 and accompanying text.

265. Comment, *supra* note 161, at 1363.

266. *See, e.g.*, Hercules Iron Works v. Elgin J. & E. Ry. Co., 141 Ill. 491, 498, 30 N.W. 1050, 1051 (1892); *In Re* Nichols Will, 54 Okla. 241, 244, 166 P. 1087, 1090 (1917); Murray v. Roanoke, 192 Va. 321, 327, 64 S.E.2d 804, 808 (1951).

267. *But see supra* notes 148-53 and accompanying text. The NEOC's failure to follow the statute which directs it to refer charges received by it to local commissions, NEB. REV. STAT. § 20-113 (Supp. 1982), interferes with the scheme of remedies in employment discrimination cases in Nebraska. If followed, the statute would require all claims filed in jurisdictions with local commissions to be heard initially by local commissions. The determinations made under local law, however, would not have preclusive effect in subsequent state proceedings. *See supra* notes 252-57 and accompanying text. As a result, claims may be heard under local law and then heard anew under state law. The NEOC, though, does not follow the statute; it does not refer charges initially filed with it to local commissions. *See supra* notes 148-53 and accompanying text. Determinations made under state law would preclude subsequent local

crimination effort.[268] The NEOC refers charges to local agencies.[269] The parties should take the local procedures seriously because the state will only intervene if the NEOC makes the specific findings required by the statute.[270] At the same time, the statute protects the state interest in the antidiscrimination effort.[271] The state can flexibly intervene[272] if the local commissions do not pursue claims with sufficient vigor.[273] In addition, the relative freedom from preclusion rules furthers the conciliation and multiple remedy rationales for multiple forums.[274]

(iii) State Court Decisions

The state and local procedures all contemplate a judicial hearing. Under the Nebraska FEPA,[275] Omaha FEPO,[276] and Lincoln FEPO,[277] a court may review the record made before and the determination made by an administrative agency. Under the Grand

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proceedings. As a result, the statutory scheme of remedies, which contemplates consideration under both local and state law without limitation by preclusion rules, is perverted. Instead, consideration can often be obtained only under state law and preclusion prevents consideration under local law.

268. *See supra* notes 191-92 & 199-200 and accompanying text.

269. NEB. REV. STAT. § 20-113 (Supp. 1982).

270. The NEOC's explicit authority to reconsider local decisions gives rise to a related argument against the application of issue preclusion. The application of issue preclusion would render the NEOC's authority to reconsider meaningless and, hence, frustrate the legislative intent.

271. *See supra* notes 193-94 and accompanying text.

272. That is, the state could intervene without being precluded by a local decision.

273. In a similar fashion, it may be that a state's enforcement procedures are "hampered by inadequate legislation, inadequate procedures, or an inadequate budget." 110 CONG. REC. 7205 (1964) (remarks of Sen. Case). *See supra* notes 192-93. Localities in Nebraska, for example, have acted more quickly, *see* Midwest Employers Council, Inc. v. City of Omaha, 177 Neb. 877, 131 N.W.2d 609 (1964), and more comprehensively, *see supra* notes 28-35 and accompanying text, to address the employment discrimination problem. The arguable, but rejected, interpretation of the "concurrent" language would allow local commissions to intervene with effective enforcement if the state commission was not pursuing claims with sufficient vigor.

This analysis recognizes that state and local policies on employment discrimination may not be identical. The state, or the locality, may have a broader, more encompassing policy against employment discrimination. Where this is the case, the normal preclusion rules should not apply. *See* Comment, *supra* note 161, at 1374-76.

274. *See supra* notes 201-04 and accompanying text.

275. NEB. REV. STAT. § 48-1120 (1978). *See supra* notes 113-23 and accompanying text.

276. OMAHA, NEB., MUN. CODE §§ 13-199 to 13-201 (1980). *See supra* notes 124-29 and accompanying text.

277. LINCOLN, NEB., MUN. CODE § 11.02.070(1) (1980). *See supra* notes 130-35 and accompanying text.

Island FEPO, the hearing itself takes place before the court.[278] Issue preclusion most commonly applies to judicial decisions.[279] In this area, the question is whether an issue decided by a court under one enforcement scheme should preclude subsequent decisions on that issue under another enforcement scheme.

The general rule of issue preclusion articulated by the Nebraska Supreme Court is:

> [Issue preclusion] may be applied if the identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the rule is to be applied was a party or in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior action.[280]

If this rule is applied in employment discrimination cases, an issue decided by a court under one enforcement scheme would preclude subsequent decisions on that issue under another enforcement scheme. For example, assume that the issue in both cases is the same[281] and that the court in the prior action issued a final judgment on the merits. If the prior action were under the Nebraska FEPA or the Lincoln FEPO, both the charging party and the respondent would have been parties. If the prior action were under the Omaha FEPO or Grand Island FEPO, the respondent would have been a party and the charging party, in all probability, would have had a sufficient measure of practical control to be bound.[282] Finally, all of the procedures provide an opportunity to fully and fairly litigate the issue.[283]

The normal application of the rule of issue preclusion in employment discrimination cases, however, is partially overridden by statute.[284] The Legislature, as noted above,[285] gave the NEOC ex-

278. GRAND ISLAND, NEB., MUN. CODE § 37-14 (1981). *See supra* note 136 and accompanying text.

279. *See* Griswold, *supra* note 162, at 1322 ("Res judicata is a function of the judicial process.").

280. Peterson v. Nebraska Natural Gas Co., 204 Neb. 136, 139, 281 N.W.2d 525, 527 (1979). *See also*, Reeves v. Watkins, 208 Neb. 804, 810-11, 305 N.W.2d 815, 819 (1981); JED Constr. Co. v. Lilly, 208 Neb. 607, 611, 305 N.W.2d 1, 3 (1981); Borland v. Gillespie, 206 Neb. 191, 198, 292 N.W.2d 26, 31 (1980).

281. For example, let us assume that the determinative issue is whether an employer refused to hire an applicant because of her sex.

282. *See supra* notes 241-46 and accompanying text.

283. *See supra* notes 234-38 and accompanying text. The Grand Island FEPO provides a full and fair opportunity to litigate in state court. GRAND ISLAND, NEB., MUN. CODE § 37-14 (1981).

284. Public policies, particularly public policies expressed through statutes, can override the normal application of issue and claim preclusion. Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 (1944); Kalb v. Feverstein, 308 U.S. 433, 444 (1940); Denver Bldg. & Constr. Trades Council v. NLRB, 186 F.2d 326, 332 (D.C. Cir. 1950), *rev'd on other grounds*, 341 U.S. 675 (1951). *See supra* note 252. *See generally* MOORE'S FEDERAL PRACTICE, *supra* note 158, at ¶ 0.405[11].

plicit authority to rehear local determinations.[286] The NEOC's authority is not limited to local determinations that have not been judicially reviewed.[287] To the contrary, the authority is expressed in expansive and broad terms.[288] It simply would not make sense for the Legislature to direct the NEOC to rehear local complaints "if the interests of justice" require a rehearing, and at the same time make the local determination binding upon the NEOC.[289]

In this area, then, the Legislature has indicated that the normal rules of issue preclusion should not apply to judicial decisions under local fair employment practice ordinances.[290] Judicial decisions under state law, however, should have preclusive effect; such preclusion is not overridden by statute.[291]

But see RESTATEMENT (SECOND) OF JUDGMENTS §§ 27-29, 83-84, 86 (1982) (public policies do not override preclusion principles in normal situation).

285. *See supra* notes 253-57 and accompanying text.

286. NEB. REV. STAT. § 20-113 (Supp. 1982). *See supra* notes 256-57 and accompanying text.

287. The NEOC's authority is not so limited even though the Unicameral knew that local determinations were subject to judicial review and even though it would have been very easy to exempt local determinations that had been judicially reviewed.

288. The NEOC has the authority to rehear a claim initially referred to local agencies if the "local agency is not handling [the] complaint with reasonable promptness, or . . . the protection of the rights of the parties or the interests of justice require . . . such action." NEB. REV. STAT. § 20-113 (Supp. 1982).

289. It could be argued that the inapplicability of issue preclusion does not make sense because it may result in the same state court hearing the same claim twice. Decisions of the Omaha Commission and the NEOC, for example, may both be reviewed in the District Court for Douglas County. This is not as anomalous as it may seem at first glance. The judicial review would be based on different records and would apply different standards of review.

290. There are additional reasons for not applying issue preclusion to judicially reviewed determinations of the Omaha Board. If the charging party is not a party to the lawsuit and consequently cannot appeal an adverse decision, issue preclusion should not apply against the charging party in a subsequent proceeding. *See supra* notes 247-51 and accompanying text. *See also* GRAND ISLAND, NEB., MUN. CODE § 37-14 (1981) (court action brought by "commission on behalf of the complainant"); *supra* notes 100-02 and accompanying text. In addition, the scope of review of Omaha Commission decisions is more restrictive than the scope of review of NEOC decisions. *See supra* notes 128-29 and accompanying text. As a result a person who loses before the Omaha Commission and cannot have the Commission's determination overturned in court, should not be bound by the adverse court decision upon judicial review of an NEOC decision. RESTATEMENT (SECOND) OF JUDGMENTS § 28(4) (1982) ("[Issue preclusion should not apply where the] party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action.").

291. *See supra* notes 258-66 and accompanying text.

IV. CONCLUSION

The procedural labyrinth in employment discrimination cases is quite complex. This Article has demonstrated the complexity of the relationship between the state and local antidiscrimination procedures in Nebraska. The sequel, to appear in a subsequent issue of the *Nebraska Law Review*, will uncover even more complexity by discussing Title VII, the federal antidiscrimination law, and its interrelationship with the Nebraska laws. The sequel will also discuss procedural strategy in employment discrimination cases in Nebraska.